CASE.

Supreme Court of the United States.

OCTOBER TERM,

THIRD [illegible]

WILLIAM J. RAINEY, [illegible]

vs.

GEORGE W. [illegible]

PETITION OF WILLIAM J. RAINEY FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS FOR THE THIRD CIRCUIT.

FILED JULY [illegible], 1894.

IN THE

Supreme Court of the United States.

EX PARTE WILLIAM J. RAINEY, APPELLANT, PETITIONER.

Petition for Writ of Certiorari requiring the Circuit Court of Appeals for the Third Circuit to certify to the Supreme Court, for its revision and determination, the Appeal of William J. Rainey, Appellant, against George W. Herbert and Others, Appellees.

To the Honorable the Supreme Court of the United States:

The petition of William J. Rainey respectfully represents:

The bill in equity was filed July 11, 1891, in the circuit court of the United States for the western district of Pennsylvania to November term, 1891, No. 30, by George W. Herbert and Thomas H. Herbert, citizens of Pennsylvania, against W. J. Rainey, a citizen of the State of Ohio.

In the bill it was averred that the town of Sedgwick was laid out in lots, streets, and alleys in Fayette county, Pennsylvania, about the year 1872, by the Youghiogheny River Oil Company, and that said company sold and conveyed to numerous persons lots of land in said town in fee simple, and delivered possession thereof to the said purchasers according to the numbers of said lots, streets, and alleys, and appropriated to public uses the said streets and alleys, and that

the complainants, relying upon said dedication to public use of the said streets and alleys, in the year 1885 purchased two adjoining lots, numbered 1 and 2, fronting on Front street and extending back to Second street, on which lots are erected a dwelling-house and outbuildings, and that the complainants paid for said lots and were then in the actual possession and occupancy of the same, and that the respondent, Rainey, was about to erect, construct, and operate a number of coke ovens for the manufacture of coke upon and along said Front street, in front of and adjoining the house and lots aforesaid. The bill then prayed for an injunction restraining the respondent from locating, erecting, and operating said coke ovens or any of them in front of or near said premises belonging to the said complainants.

To this bill the defendant answered that no lots, streets, or alleys had ever been staked off or located upon the ground, and that no town of Sedgwick was ever laid out, and specially denied that the court had jurisdiction, for the reason that the amount in controversy was not as great as $2,000, exclusive of costs, and denied that the entire value of the lands and premises amounted to as much as $2,000, and also denied the jurisdiction in equity, for the reason that the plaintiffs had a full and adequate remedy at law.

An examiner was duly appointed to take testimony, and it appeared that the complainants had conveyed the property to Henry and Margaret Herbert for the term of their natural lives and the natural life of the survivor. The testimony having been closed, the complainants then moved to amend the bill by making Henry and Margaret Herbert parties complainant.

It was an admitted fact that unless the life tenants and reversioners were joined the value of the estate before the court would not be $2,000. To make up the jurisdictional amount the circuit court allowed the complainants to unite the estates of the life tenants with those of the reversioners, although their estates were totally distinct and the parties

held by different titles. This objection was made by the defendant *in limine* as soon as the amendment was proposed. It is respectfully submitted that under the decisions of your honorable Court such separate estates cannot be united to give jurisdiction.

The evidence as to the value of the entire property was conflicting, and testimony was offered by the complainants tending to prove that the house and lot were worth $2,500. The testimony on the part of the respondent tended to prove that it did not exceed $1,000, but there was no testimony offered on the part of the complainants tending to prove that any pecuniary damage would result to the complainants from the occupancy of the alleged street as a street, the evidence tending to show damage to the property relating exclusively to the injury to the property from the operation of the ovens. It was an undisputed fact that the house of the complainants was the only one ever erected in the so-called town of Sedgwick, and that the scheme proved abortive, and that the streets were never laid out or used as streets, and that at the time the respondent bought the property it was all an open farm, with the exception of the house and lot belonging to the complainants. The evidence as to the line and boundaries of the alleged street was conflicting, but the decree of the circuit court enjoined the defendant from locating and erecting any coke ovens in or upon Front street, in the plot or plan of the village of Sedgwick, in Fayette county, Pennsylvania, and from operating any coke ovens so near the premises of the said complainants as to injure the same by reason of flames, heat, gases, or smoke emitted therefrom, and ordered and decreed that the defendant should immediately cease to operate and within thirty days remove from the said Front street, in the said village of Sedgwick, all coke ovens, buildings, structures, building materials, or obstructions to travel of any kind whatever. The decree did not fix the boundaries of the alleged street or determine what ovens were to be removed.

From the decree thus entered the defendant appealed to the circuit court of appeals of the third circuit, but the circuit court of appeals sustained the jurisdiction upon the ground that, although there was some conflict of testimony as to the amount of the damage which would result to the complainants from the construction and operation of the ovens, the court below found that the averment that it would exceed $2,000 was supported by abundant evidence, and if the matter in dispute were simply and solely the threatened injury to the plaintiffs, this finding of fact might be accepted as in itself conclusive; but if this were otherwise, the want of a sufficient amount of damage having been alleged and proved to give the Federal courts jurisdiction would not defeat the remedy, as the prohibition of the contemplated erection of the ovens was the matter of controversy, and the value of that object (admittedly in excess of the jurisdictional amount) must govern.

The court of appeals, however, sustained the seventh assignment of error, relating to the second clause of the injunction order, which restrained the defendant "from operating any coke ovens so near the premises of the said complainants as to injure the same by reason of flames, heat, gases, and smoke emitted therefrom," upon the ground that the only prayer for special relief was to restrain the respondent from locating and erecting said coke ovens or any of them upon the said street, in front of or near the said premises, and that the case made by the bill upon the record was wholly confined to the distinct subject of the proposed erection and operation of the ovens upon Front street.

Upon this state of the record your petitioner respectfully shows that the amount in controversy was not such as to give the circuit court jurisdiction. No evidence was offered tending to show the amount of pecuniary damage, or that any pecuniary damage would result to the complainants from the occupancy of an imaginary street which had never been laid out or used and was never in fact a highway and

led nowhere and connected with nothing, and the basis of jurisdiction assumed both by the circuit court and by the circuit court of appeals, that the possible injury to the defendant from granting the relief prayed for, is not sustained by the language of the act of Congress. Where the court has sustained jurisdiction by reason of the amount of the injury done to the defendant, as in cases of appeal, it has been where the defendant himself invoked the jurisdiction.

Your petitioner further shows that the bill as maintained by the circuit court of appeals was made a substitute for an action at common law to recover damages for the disturbance of an easement or right of way by erections made by him upon the alleged line of an imaginary highway, and that no ground for equitable relief existed in reference to the removal of the ovens, as no immediate or irreparable damage was shown or suggested, and it was the constitutional right of the appellant that the question of fact should have been tried by a jury.

Your petitioner files herewith, as required by rule 37, a certified copy of the entire record of the cause in the circuit court of appeals, and respectfully shows to your honorable court that the questions involved, relating to the jurisdiction of the circuit court of the United States for the western district of Pennsylvania to entertain jurisdiction of the case, both because the matter in dispute did not exceed the sum or value of $2,000 and because the complainants had an adequate remedy at law, and the question of the regularity of a final decree so vague and uncertain in its terms that the defendant cannot know in advance what it is that he is ordered to do and perform, are of such gravity and importance as to justify to your honorable court an application to require the record of the said proceedings to be certified to the Supreme Court for its review and determination.

Wherefore your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the circuit court of appeals for the third circuit, to

certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings from the court of appeals, to the end that the said case may be reviewed and determined by this Court, as provided by section 6 of the act of Congress approved March 3, 1891, and that the said judgment of the said circuit court of appeals in the said case and every part thereof may be reversed by the Court.

And your petitioner will ever pray.

WM. J. RAINEY.

STATE OF OHIO, }
County of Cuyahoga, } *ss:*

William J. Rainey, being duly sworn according to law, deposes and says:

I have read the foregoing petition, and the facts therein stated, so far as they are stated of my own knowledge, are true, and so far as they are stated upon the information of others I believe them to be true, and the appeal is prayed for, not for the purpose of delay, but because I believe that injustice has been done.

Sworn and subscribed to before me this 5th day of July, 1893.

[SEAL.] CHAS. G. F. VON W. EMERY,
Notary Public.

[Endorsed:] In the Supreme Court of the United States. *Ex parte* William J. Rainey, appellant, petitioner. Petition for writ of certiorari requiring the circuit court of appeals for the third circuit to certify to the Supreme Court of the United States, for its revision and determination, the appeal of William J. Rainey, appellant, against George W. Herbert and others, appellees. Sam'l Dickson, for petitioner.

Endorsed on cover: Case No. 15,360. United States circuit court of appeals, third circuit. Term No., 976. William J. Rainey, appellant, *vs.* George W. Herbert *et al.* Filed July 28th, 1893.

CASE No. 15,360.

SUPREME COURT OF THE UNITED STATES.

William J. Rainey, Appellant,

vs.

George W. Herbert et al.

October Term, 1893.
Term No. 976.

BRIEF OF ARGUMENT IN SUPPORT OF APPLICATION FOR WRIT OF *CERTIORARI.*

It is believed that either the question of Federal jurisdiction or that of equitable jurisdiction, both of which are raised by this petition, is of sufficient importance to justify the present application.

For the purposes of this argument the facts are sufficiently stated in the petition, and the opinion of the Circuit Court, page 268, and of the Circuit Court of Appeals, page 278.

The points relied upon to induce this court to take cognizance are:—

First.—The amount in controversy was not sufficient to give the Circuit Court jurisdiction.

Second.—The decree entered by the Circuit Court of Appeals was one which a court of equity had no power to make.

The first question is discussed by the Circuit Court at pages 271, 272, and by the Circuit Court of Appeals at page 278, and the substantial ground of the decision is that the granting of the injunction prayed for would do the defendant an injury in excess of $2000. The question thus presented is whether the plaintiff is entitled to invoke the jurisdiction of the Circuit Court, not because the injury to him, which he prays may be averted, but the injury to be done to the defendant by the granting of his prayer would exceed the statutory limit.

The original bill was filed by George W. and Thomas H. Herbert, who had conveyed life estates to Henry Herbert and Margaret Herbert (page 267), and the amendment making the life tenants parties was not asked for until the testimony had been closed. (Pages 10, 11.) The *ante litem* valuation of the property referred to by the circuit judge (page 271) was not, in any proper sense, a valuation made *ante litem motam*, for work had been begun, and the defendant was committed to his plan of improvements, and the price named was for selling out and moving away. (Pages 105, 117, 239, 240.)

Even if the court should be of opinion, therefore, that the life tenants and reversioners could join, it is clear that down to the time of the amendment there could be and was no pretense that the injury done to the reversioners would be sufficient to give the court jurisdiction.

In both opinions, however, this objection is met by the answer that the damages to the defendant from the continuance of the injunction would amount to many thousands of dollars (pages 272, 278, 279), and that this may be regarded as the matter in dispute.

But if this view be sound the owner of a lot of ground of nominal value may bring suit in the Circuit Court to enjoin the operations of a chemical factory of which the fumes destroy his vegetables; the owner of a trout pond, containing a dozen trout, may file his bill in that court to restrain the pumping of mine water which would kill his fish; the owner of a lot encroached upon a hair's-breadth may invoke the Federal jurisdiction to compel the removal of a costly building, not because the real "matter in dispute" or the real "amount in controversy"—the vegetables, or the fish, or the ribbon-like strip, is worth a ten dollar bill, but because the establishment of the right would inflict damage to the defendant to the amount of hundreds of thousands of dollars.

It is respectfully submitted that this question is of serious importance and worthy of deliberate discussion and careful consideration.

Upon examination, it will be found that the authorities relied on were cases where the right of appeal was involved, and jur-

isdiction was sustained because the injury to the appellant was sufficient to give the court jurisdiction. In other words, a litigant invoking the jurisdiction of the court must present a claim of sufficient magnitude to entitle *him* to demand its interference. A defendant who appeals is as much an actor as the plaintiff who brings suit, but in the first instance the plaintiff must have a real claim of the necessary magnitude. The statement of the rule by Ellsworth, C. J., has never been qualified. In the old case of Wilson *vs.* Daniel he said:—

"It was not intended to say that on every such question of jurisdiction the demand of the plaintiff is alone to be regarded, but that the value of the thing put in demand furnished the rule. The nature of the case must certainly guide the judgment of the court, and whenever the law makes a rule that rule must be pursued. Thus, in an action of debt on a bond for £100 the principal and interest are put in demand, and the plaintiff can recover no more, though he may lay his damages at £10,000. The form of the action, therefore, gives in that case the legal rule."

3 Dallas, 407.

And so, in Gorman *vs.* Havird, 141 U. S., 208, the court says:—

"If it clearly appear from the whole record that under no aspect of the case the plaintiff could recover the full amount of his claim, this court will decline to assume jurisdiction of the case. If, for instance, a greater amount than $5000 were claimed in the *ad damnum* clause of the declaration, and the bill of particulars showed the actual claim to be less, the latter would determine the jurisdiction."

On the other hand, in the case of Railroad Company *vs.* Ward, 2 Black, 485, relied on by the court below (pages 272, 279 of record), where Mr. Justice Catron said, page 492: "The removal of the obstruction is the matter of controversy, and the value of the object must govern," he was speaking of the right of the defendant to appeal. So in Whitman *vs.* Hubbell, 30 Fed. Rep., 81, the defendant was allowed to remove the suit upon the ground that the value of the right

to maintain the awning sought to be enjoined, and not the damage to the plaintiff, was the matter in dispute, but this case would be no authority for the right of the plaintiff originally to bring his action in the Circuit Court.

So, in Gordon *vs.* Ogden, 3 Peters, 33, overruling Wilson *vs.* Daniel, upon this point, Chief Justice Marshall said: "If a writ of error be brought by the defendant in the original action, the matter in dispute cannot exceed the amount of the judgment." Or, as Chief Justice Waite expressed it, in Hilton *vs.* Dickinson, 108 U. S., 165, 174: "When a defendant brought a case here the judgment or decree against him governed our jurisdiction, unless he had asked affirmative relief, which was denied." Hence, the rejection of a set-off entitled the defendant to appeal, Black *vs.* Darling, 140 *Ib.*, 234, while the incidental or collateral bearing of the judgment cannot be taken into account, as the rule excludes "any estimate of value not actually the subject of that litigation." Elgin *vs.* Marshall, 106 *Ib.*, 578; New England Mortgage Company *vs.* Gay, 145 *Ib.*, 123.

Nor would the joinder of distinct claims enable a plaintiff whose own demand was insufficient, to maintain his suit, for, as was said in Gibson *vs.* Schufeldt, 122 U. S., 27–34, where several persons joined in one suit, and asserted several and distinct interests, and those interests alone are in dispute, the amount of the interest of each is the limit of the appellate jurisdiction, and in Market Company *vs.* Hoffman, 101 U. S., 112, where the plaintiffs, who joined in the suit, had claims in the aggregate exceeding the limit, it was the defendant that appealed.

It is also submitted that the life tenants and reversioners could not unite. In Clay *vs.* Field, 138 U. S., 464, the court says: "If several persons have a common and *undivided interest*, though separable as between themselves, the amount of their joint interest will be the test of jurisdiction." The court goes on, however, to say, "but where the interests are *distinct* and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a com-

mon fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdiction by appeal, but each case must stand upon or fall by itself alone."

It is clear that the amendment, allowing the life tenants to be made parties, should not have been allowed without requiring the payment of costs. The authorities upon the question are comparatively few, but Daniell is the recognized authority upon all questions of practice. Thompson *vs.* Wooster, 114 U. S., 112, note. The subject of the allowance of costs is systematically and fully treated in chapter 31, and as the result of all the authorities, it is stated, section 2, that the general rule adopted by the Court of Chancery is that the unsuccessful party must pay the costs (star page 1382), and it is further stated, as a general rule (star page 1405), that the successful party, although he may be deprived of his costs, never pays them. It is well settled that an appeal lies from a decree in equity for costs. Trustees *vs.* Greenough, 105 U. S., 27.

The main objection, however, to the jurisdiction, is that under the decree as amended by the Court of Appeals the only relief granted is the protection of the easement in the street, and there is no evidence in the record tending to show that any substantial damage would result from the erection of the ovens upon the alleged street. It is undisputed that the house of the complainants was the only one ever built (page 35), and that no one ever made use of the so-called Front Street, and "the property around the house was all open property." (Pages 121, 216.)

Second.—The Court of Appeals has expressly disclaimed the jurisdiction in equity to enjoin the erection of the ovens as a nuisance, independently of the encroachment upon Front Street (pages 279, 280), and the seventh assignment of error (page 276) is sustained, and the injunction restricted to restraining the defendant from locating, erecting, and operating coke ovens upon that street in front of or near the premises of the plaintiffs. This is a purely mandatory injunction, and equivalent to a judgment in ejectment. The plaintiffs alleged

that they were entitled to an easement in a street, which had been laid out upon paper twenty years before, but never used, and the defendant maintained that as the lines of the street had never been marked on the ground, and were, in fact, in dispute, and that there had been an abandonment by all the parties in interest, he had proceeded in good faith, and expended his money in the erection of his ovens.

The Court of Appeals declared that the pleadings had made this the only controversy. This is undoubtedly true, but it converted the bill into a pure ejectment bill, and thereby ousted the jurisdiction of the court.

It is well established law that before a court in equity will enter a decree of ouster it must be absolutely convinced of the plaintiff's title to the land or his right to assert a servitude thereon. The present proceedings aim at divesting the defendant's title to the land in front of or adjoining the premises of the plaintiffs, by either obtaining the land in fee simple to the middle of this alleged street (through its vacation and abandonment), or by imposing a servitude upon the same to the detriment of the defendant in use and possession of the land. In a proceeding at law the exact intention of the plaintiffs would appear, the extent of their claim fixed by metes and bounds, and the jury would pass upon the many questions of fact before the court would attempt to apply the law.

"A bill will not lie, if it is in substance and effect an ejectment bill." Kellain *vs.* Ebvinghouse, 110 U. S., 586.

"The common law of right of trial by jury should not be taken away where a wrong done by a party can be redressed by it." Clark's App., 12 P. F. Smith, 487; Richard's App., 57 Pa., 105; Jerome *vs.* Ross, 17 Johnson's Ch., 330; Parker *vs.* Sike Woolen Co., 2 Black, 545.

"When the right of the plaintiff is denied and is doubtful, a court of equity will not interfere until the plaintiff has established his title at law." Rea *vs.* Forsythe, 1 Wright, 503.

"Courts of equity will not exercise jurisdiction in case of private nuisance or disturbance of easements, where the right of plaintiff is disputed, until he has established his in an action at law." *Ibid.;* Adams Equity, 485; 2 Story's Eq., 925; N.

Pennsylvania Coal Co. *vs.* Snowden, 6 Wright, 488; Bartley's App., 93 Pa., 50; Long's App., 11 Norris, 171.

"While a court of equity will sometime issue an injunction in case of private trespasses, it will only do so when the right is clear. If the facts be disputed and the right not clear, the plaintiff must first establish this right at law, and the objection that he has not done so goes to the jurisdiction in equity." Parker *vs.* Cotton and Woolen Co., *supra;* Mirkil *vs.* Morgan, 134 Pa.. 144.

"If the complainants' title be doubtful, the ordinary rule is not to interfere until the title has been established at law." Mowday *vs.* Moore, 133 Pa., 598; New Castle *vs.* Rainey, 130 Pa., 546; Washburn's App., 105 Pa., 480; Minnig's App., 82 Pa., 373.

In settling the title to a right of way, especially where the interests of the defendant are materially affected, the courts apply just as strict a rule to its establishment at law, if it is denied, as in the case of recovery of the realty. In the case of North Pa. Coal Co. *vs.* Snowden, 42 Pa., 490, Judge Strong says: "Has it ever been supposed that one can file a bill in equity complaining that the right which he claims is denied, and the enjoyment thereof refused him, and praying for an injunction against such denial and refusal of enjoyment? Has any chancellor ever sustained such a bill, or considered that he had jurisdiction of such complaint."

King *vs.* McCarthy, 38 Pa., 76: "The right should be clear to warrant a decree to be followed by an injunction to compel the keeping open of a way by one man over the premises of another. If doubtful, this of itself would be sufficient reason to induce a chancellor to pause until the right be established at law." In the case of Tillmes *vs.* Marsh, 67 Pa., 507, it was held that a dispute over boundary lines was in effect an attempt to substitute equity for an ejectment suit.

To sustain the present proceedings means the destruction of a large plant, the ejectment from land occupied under a deed in fee simple, and that by parties neither proving title. the extent of the *locus in quo*, or any adjudication by a court and jury divesting the defendant of valuable land bought and occupied in good faith.

Finally, if the court should entertain jurisdiction, it will be asked to consider the question of whether or not such a claim to an imaginary street can be maintained after the project had been abandoned for nearly twenty years. Many hundreds of miles of streets and avenues have been laid out, not merely upon paper, but marked on the ground, and cut through forests, in various parts of the United States, during the last few years. It is a question of very grave importance to determine whether the owner of a single house, built in the carrying out of such a project, can prevent the reclamation of the thousands of acres of theoretical streets, after the enterprise has proved a failure and it has become apparent that no second dwelling will ever be erected.

SHIRAS & DICKEY,
SAMUEL DICKSON,
For Petitioner.

154 U.S. 514

CASE No. 15,360.

EXHIBIT TO PETITION FOR WRIT OF CERTIORARI.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 14, MARCH TERM, 1893.

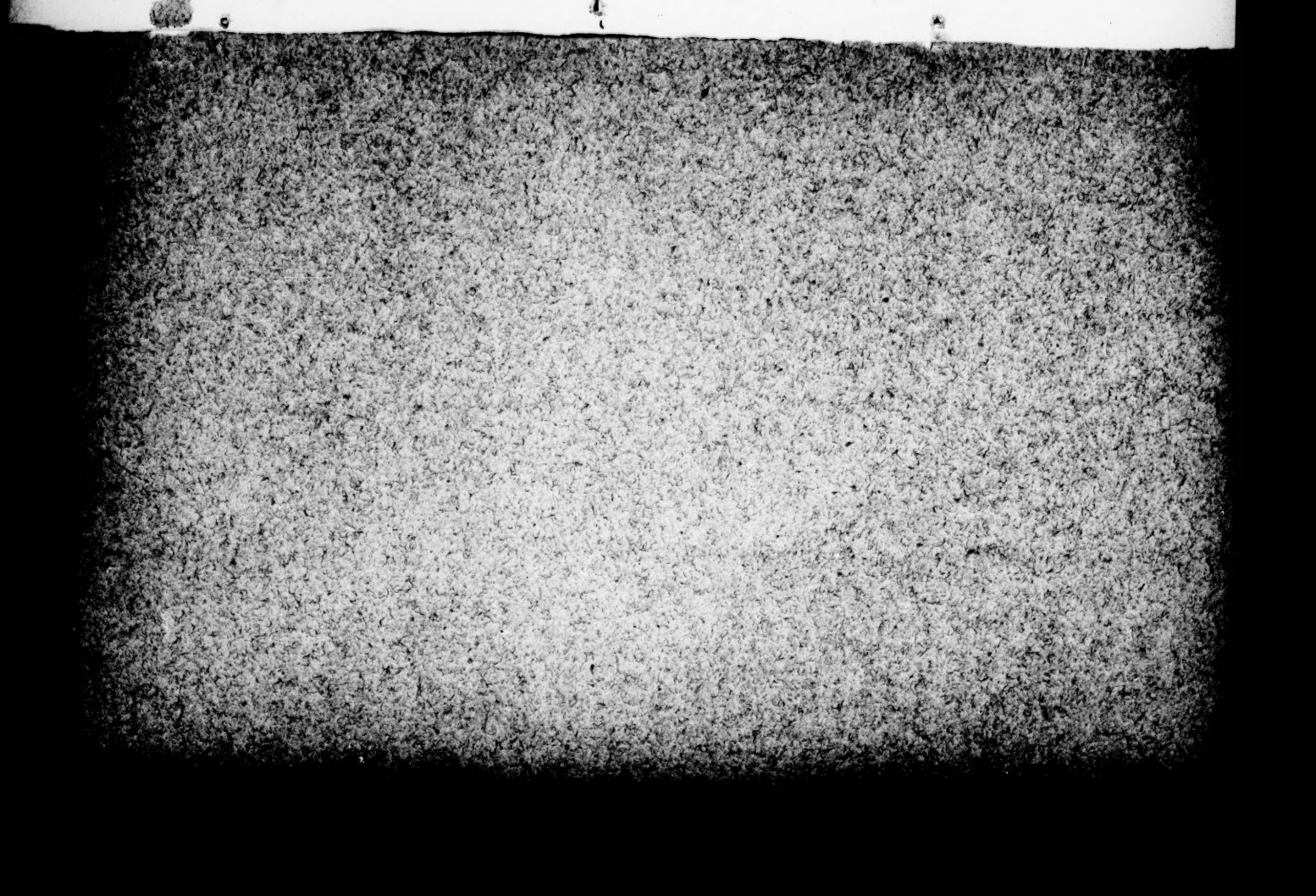
WILLIAM J. RAINEY, APPELLANT,

vs.

GEORGE W. HERBERT ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED FEBRUARY 15, 1893.



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a United States Circuit Court of Appeals for the Third Circuit.
March Term, 1893.

WILLIAM J. RAINEY, Appellant,
versus
GEORGE W. HERBERT, THOMAS H. HERBERT, HENRY HERBERT, and MARGARET HERBERT, Appellees. } No. 14.

Record on Appeal from the Decree of the United States Circuit Court for the Western District of Pennsylvania.

Shiras & Dickey, counsel for the appellant; Edward Campbell, J. M. Garrison, counsel for the appellees.
Filed February 15, 1893.

1 Among the rolls, records and judicial proceedings had in the circuit court of the United States for the western district of Pennsylvania, wherein George W. Herbert *et al.* are complainants and William J. Rainey is defendant, entered at No. 30 November term, 1891, in equity, may be found the following words and figures, to wit:

Equity Docket Entries.

Edward Campbell, J. M. Garrison.	GEORGE W. HERBERT, THOS. H. HERBERT, Citizens of Pennsylvania and Residents of Sedgwick, Fayette Co., Pa.,
	vs.
George Shiras 3d.	W. J. RAINEY, a Citizen of the State of Ohio and a Resident of Cleveland.

Bill filed July 11, 1891. Same day, subpœna issued, returnable first Monday of August next. Same day, affidavits of complainants filed, and motion made for a preliminary injunction against defendant, and order granted fixing hearing for July 14, 1891, at 11 a. m., filed.

1891, July 14. Upon motion of complainants' solicitor, order granted continuing hearing on motion for preliminary injunction until July 17, 1891.

1891, July 17. Order granted continuing hearing on motion for injunction until July 18, 1891, and filed.

1891, August 4. Subpœna returned not found.

1891, August 7. Precipe for alias subpœna, filed, and alias subpœna issued, returnable first Monday of September next.

1891, August 8. Affidavits of Geo. W. and Thomas H. Herbert and Solomon Baker and D. H. Wingrove filed. Same day, bill and affidavits presented and read and motion for preliminary injunction fixed for hearing on Friday, August 14, 1891, at 10 a. m. Notice to be given forthwith, and there appearing to be danger of irreparable injury, a restraining order granted, restraining defendant

from erecting or operating coke ovens on Front street, and
2 until the hearing of above notice, and further order of the court filed. Restraining order issued.

1891, August 14. Hearing on motion for injunction continued until August 28, 1891. Restraining order to continue in the meantime. Order filed.

1891, August 27. Notice of motion for injunction returned *n. e. i.*

1891, August 28. Hearing on above notice continued until September 4, 1891. Restraining order to continue in the meantime. Order filed. Same day, petition of George W. Herbert for a rule on W. J. Rainey, Thomas Mitchell and John Fox to show cause why they should not be attached for contempt, presented, and September 4, 1891, fixed for hearing on the application for a rule to show cause. Petition filed.

1891, September 4. Hearing on motion for injunction and for a rule for an attachment continued until September 12, 1891, at 10 a. m. Restraining order to remain in force. Order filed.

1891, September 10. Alias subpœna and restraining order returned served on August 27, 1891, on W. J. Rainey, defendant, personally and by copy in the city of Pittsburgh. Mar. $5.00.

1891, September 12. Affidavits of W. J. Rainey, David R. Anderson, T. Ewing Oglesbee, A. J. Hill (3), T. J. Mitchell (2), S. H. Patterson, W. S. Coburn, Jno. S. Kelly, Conrad Getz, Jas. C. Beatty, and copy of deed Youghiogheny Oil Co. to W. J. Rainey, and copy of deed from James Cochran *et ux.* to Thos. Herbert *et al.*, on part of defendant on motion, filed. Some day motion for injunction argued, *c. a. v.*

1891, September 19. Affidavits of complainants of Geo. W. (2) and Thos. H. Herbert (2) John Ellenberger, Geo. H. Kuhn and Sam'l Short, D. H. Wingrove, Henry Richter and F. H. Rosboro, L. S. Strickler, Daniel Ansell, C. C. Ruse, Geo. Whipkey, and Solomon Baker, T. H. Herbert, Daniel Sproat, and title papers (deeds) numbered from 1 to 7, inclusive, filed.

3 1891, September 23. Affidavit of Geo. W. and Thos. H. Herbert, filed, and copy of deed, Cochran to Rainey, filed.

1891, September 25. Plan of the village of Sedgwick, filed.

1891, October 3. Opinion of the court with order awarding preliminary injunction, filed.

1891, October 7. Decree granted awarding a preliminary injunction, according to the prayer of the bill, filed. Same day, preliminary injunction issued.

1891, November 4. Defendant's answer filed.

1891, November 9. Replication filed.

1891, November 13. Upon agreement and motion Mrs. L. D. Iams is appointed examiner. Certificate of appointment issued.

1891, November 16. Preliminary injunction returned served on October 12 on Thos. J. Mitchell, superintendent and John Fox, foreman, employés of defendant personally and by copy. Mar. $12.70.

1891, December 7. Petition of complainants praying for an attachment against defendant presented and rule granted on W. J.

Rainey to show cause why he should not be attached for contempt. Returnable December 15, 1891, at 10 a. m. Some day rule issued.

1891, December 14. Answer to rule of December 7, filed.

1891, December 17. Rule for contempt served by acceptance by Geo. Shiras, Jr., attorney for defendant on December 7, 1891. Mar. $2.50.

1892, April 6. Testimony (1 pkg.) taken before Lucy Dorsey Iams, examiner on part of complainants and defendant, filed.

1892, April 14. Complainants move the court to amend their bill by adding the names of Henry Herbert and Margaret Herbert, as complainants, presented at chambers, and a rule granted on defendant to show cause, within 10 days after notice to his counsel, why the motion should not be allowed. Motion filed.

4 1892, April 16. Proof of service of notice of above rule filed.

1892, April 26. Specifications of objections to the allowance of amendment to bill filed.

1892, May 13. Motion on behalf of complainants for leave to file certain documentary evidence, with proof of service of notice of motion, and agreement that the same may be filed, subject to their relevancy and competency, and order thereon directing same to be filed, subject to the above objection. Same day Exhibits Deeds Nos. 1 to 7 filed. Also 2 maps marked A and No. 2 filed.

1892, June 7. Petition of Henry Herbert and Margaret Herbert for an amendment to the bill by adding their names, etc., with affidavit of Edward Campbell in support thereof, presented, and motion to amend, petition, affidavit and specification of objections to said motion argued, and the same is allowed. Defendant to have 20 days to answer bill as amended if he desires. The question of costs reserved, filed.

1892, July 6. Answer to amended bill filed.

1892, July 6. Replication filed.

1892, August 31. Stipulation filed. Same day. Cause called for hearing on pleadings and proofs and was argued in part. September 1st, argument concluded, *c. a. v.* Same day. Motion for attachment heretofore entered. Argued *c. a. v.*

1892, December 14. Opinion of the court discharging rule for attachment and denying attachment filed. Also opinion with order awarding a decree in favor of the complainants, filed.

1892, December 24. Cause came on for hearing on motion to settle decree, and argued *c. a. v.*

1892, December 30. Decree entered awarding a preliminary injunction against defendant, his servants, agents and employés, from erecting or locating any coke ovens in or upon Front street of the village of Sedgwick, Fayette county, Pa., or from operating

5 so near the premises of the said complainants' premises as to injure the same by reason of flames, heat, gases or smoke, emitted therefrom. It is further ordered that said defendant immediately cease to operate and within 30 days remove all coke ovens, buildings, structures, materials or obstructions to travel, and restore the said street to the condition it was when he entered upon

the same, no right or remedy at law shall be prejudiced by this decree, and that the respondent pay the costs of the case. Decree filed.

December 31. Injunction issued.

1893, January 17. Plaintiffs' bill of costs filed.

1893, January 17. Petition for appeal to the U. S. circuit court of appeals for the third circuit, with bond of W. J. Rainey, with Alex. J. Hill as surety, in the sum of six thousand dollars, presented and approved and appeal allowed, and same day citation returnable in U. S. circuit court of appeals on the 16th day of February next awarded. Same day. Citation served on J. M. Garrison, Esq., counsel for appellee. Same day. Assignments of error, filed.

Bill in Equity.

George W. Herbert and Thomas H. Herbert, citizens of Pennsylvania, and residents of Sedgwick, Fayette county, Pennsylvania, in the western district of Pennsylvania, bring this, their bill of complaint, against W. J. Rainey, a citizen of the State of Ohio, and resident of the city of Cleveland, and thereupon the said complainants say, that the said town of Sedgwick was laid out in lots, streets and alleys in Fayette county, Pennsylvania, about the year 1872, by the Youghiogheny River Oil Company, a corporation of the State of Pennsylvania, which corporation was the owner in fee simple of the land whereon the said town was located; that the said Youghiogheny River Oil Company sold and conveyed to numerous persons lots of land in the said town in fee simple, and delivered possession thereof to the said purchasers according
6 to the numbers of the said lots and streets and alleys, and appropriated to public uses the said streets and alleys of the said town; that your orators relying upon the said dedication to public use of the said streets and alleys, according to the said plan of the said town of Sedgwick in the year 1885 purchased in fee simple, accepted the deed, and entered into possession of two adjoining lots numbered in the said town 1 and 2, fronting on a certain street in the said town called Front street, 109 feet, and extending back the same width 200 feet to Second street, on which lots are erected a dwelling-house and out-buildings; that your orators paid for the said lots and are now in the actual possession and occupancy of the same.

Par. 2.

The respondent, W. J. Rainey, without any authority whatever, and in violation of your orators' rights in the premises, and to the great actual damage and injury of your orators' house and lot aforesaid, is about to erect, construct, and operate a number of coke ovens for the purpose of continuously burning coal therein and manufacturing coke therefrom, upon and along the said Front street, in front of and adjoining your orators' house and lots as aforesaid.

Par. 3.

That the construction, erection and operation of the said coke ovens upon the said Front street of the said town of Sedgwick will be a permanent and continual trespass upon the said lots belonging to your orator, and injury to the said building of your orator, a permanent obstruction to the ingress, egress and regress of your orators in, to and out of their said premises and a nuisance to your orators by producing smoke, flame and heat continuously so near to the premises aforesaid as to render the same uninhabitable.

7 Par. 4.

That the defendant has made preparations to erect and construct the said coke ovens on Front street, as aforesaid, and by his agents, servants and employés, is now digging, grading and preparing the ground in front of your orators' said lots on the said street for the permanent location and erection of the said ovens thereupon.

Par. 5.

The said house and lots of land so belonging to your orator, as aforesaid, are of very great value and the damage to the same, if the respondent should erect the said coke ovens upon the said street, and operate the same as aforesaid, would be more than $2,500.

Prayer for Relief.

Your orators therefore pray your honors for a preliminary injunction, hereafter to be made permanent, restraining the respondent from locating, erecting and operating said coke ovens or any of them upon the said street in front of or near the said premises belonging to your orators as aforesaid.

Par. 2.

And your orators pray your honors to grant him a subpœna, addressed to the respondent commanding him to appear and answer this bill of complaint, and to abide by the order and decree of the court in the premises.

Par. 3.

For such other and further relief as to your honors may seem meet and to right and justice may belong.

EDWARD CAMPBELL,
J. M. GARRISON,
Attorneys for Complainant.

Filed July 11, 1891.

8 *Chancery Subpœna.*

UNITED STATES OF AMERICA, }
Western District of Pennsylvania. }

The United States of America to W. J. Rainey, a citizen of the State of Ohio and a resident of Cleveland, Greeting:

We command you and every of you, that you appear before our judges of our circuit court of the United States of America for the western district of Pennsylvania, at the city of Pittsburgh, in said district, on the first Monday of August next, to answer the bill of complaint of George W. Herbert, Thomas H. Herbert, citizens of the State of Pennsylvania, and residents of Sedgwick, Fayette county, Pa., within said district filed in the clerk's office of said court, in the city of Pittsburgh, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default. And this you are in nowise to omit, under such penalties as are inflicted by the laws of the United States.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the city of Pittsburgh, aforesaid, this 11th day of July, in the year of our Lord one thousand eight hundred and ninety-one and of our Independence the 116th.

[SEAL.] H. D. GAMBLE, *Clerk.*

MEMORANDUM.—The above-named defendant is required to enter an appearance in the above-entitled cause, on or before the first Monday of the month ensuing twenty days after the service
9 of this writ, otherwise the complaint may be taken against him as confessed, and a decree entered accordingly.

H. D. GAMBLE, *Clerk.*

And now, August 4, 1891, after diligent search the defendant cannot be found within the western district of Pennsylvania.

So answers—

J. R. HARRAH,
U. S. Marshal.

Precipe for Alias Subpœna.

Please issue alias subpœna in this case, returnable to the first Monday of September, 1891.

EDWARD CAMPBELL,
J. M. GARRISON,
Att'ys for Plaintiffs.

To H. D. Gamble, clerk.

Filed August 7, 1891.

Alias Chancery Subpœna.

UNITED STATES OF AMERICA,
Western District of Pennsylvania.

The United States of America to W. J. Rainey, a citizen of the State of Ohio and a resident of Cleveland, Greeting:

We command you and every of you, that you appear before our judges of our circuit court of the United States of America for the western district of Pennsylvania, at the city of Pittsburgh, in
10 said district, on the first Monday of September next to answer the bill of complaint of George W. Herbert and Thomas H. Herbert, citizens of the State of Pennsylvania, and residents of Sedgwick, Fayette Co., Pa., within said district filed in the clerk's office of said court, in the city of Pittsburgh, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default. And this you are in nowise to omit, under such penalties as are inflicted by the laws of the United States.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the city of Pittsburgh, aforesaid, this 7th day of August in the year of our Lord one thousand eight hundred and ninety-one and of our Independence the 116th.

H. D. GAMBLE, *Clerk.*

MEMORANDUM.—The above-named defendant is required to enter an appearance in the above-entitled cause, on or before the first Monday of the month ensuing twenty days after the service of this writ, otherwise the complaint may be taken against him as confessed, and a decree entered accordingly.

H. D. GAMBLE, *Clerk.*

I hereby depute James H. Page to execute the within chancery subpœna.

J. R. HARRAH,
U. S. Marshal.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, } *ss:*

James H. Page, being by me duly sworn according to law,
11 deposes and says that he served the within subpœna personally on W. J. Rainey, defendant, on August 27, 1891, by making known to him the contents thereof and giving to him a true and attested copy of the same, to wit, in the city of Pittsburgh, within said western district.

JAMES H. PAGE.

Sworn and subscribed this 27th day of August, 1891, before me.

S. C. McCANDLESS,
U. S. Commissioner, West. Dist. of Penna.

Served as above, so answers—

J. R. HARRAH, *Marshal.*

Defendant's Answer.

The said defendant saving and reserving to himself all and all manner of exceptions to the manifold errors, defects and inconsistencies of the plaintiffs' bill of complaint, for answer says .

1. This respondent avers that by deed of the Youghiogheny River Oil Company, bearing date the 11th day of December, 1879, recorded in the office of the recorder of deeds in and for the county of Fayette, in the State of Pennsylvania, on the 30th day of January, 1880, he purchased for value the tract of land mentioned in said bill whereby the respondent is now erecting his coke ovens; that said deed of conveyance contained no notice of any town plat, plan of lots, streets, ways or other matters alleged in the first paragraph of the plaintiffs' bill, and that at the date of said deed to respondent there was no notice whatever of the said alleged plan, streets, ways, and dedication of record or upon the lands and premises in controversy ; that no lots, streets or ways, were before the date of said deed to
12 respondent, or then, or since marked out, staked off or located upon the ground, and that no dedication to the public use or other use of any street or streets, way or ways whatever then appeared in any manner whatever. And this respondent denies that there ever was any town of Sedgwick laid out.

2. This respondent has no knowledge of the plaintiffs' title and of the facts and circumstances connected with the alleged purchase by the plaintiffs, except from said bill of complaint, and leaves the plaintiffs to make such proof of their title and of the facts and circumstances of the alleged purchase by them as they may be advised, and that they may make such proof, this respondent upon advice, denies the title of the plaintiffs, and denies that they purchased the premises of which they allege they are in possession relying upon or with reference to any town plan, streets, lanes or ways whatever, other than the township road. This respondent denies that said Youghiogheny River Oil Company sold and conveyed to numerous persons lots of land in said town in fee simple and delivered possession thereof to such purchasers. And respondent avers that without any notice of such alleged plan of lots, streets and ways, he purchased his said land for the purpose of erecting coke ovens, for the purpose of converting the coal therein and also a coal-field of this respondent adjoining said land into coke. Respondent avers that in the year 1882, or thereabouts, the line of coke ovens which respondent was before the granting of the restraining order in this cause engaged in erecting, was survey- and the location thereof was determined and plainly staked off and marked and designated upon the ground, and remained so staked off and marked until the commencement of the work of erecting said ovens. And this respondent avers that if said alleged streets and ways including the alleged street called by the plaintiff Front street, were ever dedicated to public, or private use (of which respondent had no notice, and which he does not know and upon advice denies) the same were all aban-

doned long prior to the date at which the said conveyance was made to this respondent.

13 3. This respondent denies that the erection, construction and operation of the said coke ovens will in any manner interfere with ingress or egress to and from the complainants' lands, or in any manner damage the value thereof, and denies that said construction and operation will in any manner be a trespass upon the complainants' lands or will in any manner be an invasion of their rights.

4. This respondent denies that said coke ovens are erected or located upon any street or way whatever, and denies the existence of any street or way called Front street, and avers that this respondent has laid out and located and was prior to the granting of said restraining order engaged in erecting coke ovens wholly upon his own land, to which land respondent holds the title in fee simple, free from any and all streets, ways, easements and servitudes.

5. This respondent further answering denies that this honorable court has jurisdiction of this suit for the reason that the amount in controversy in this cause is not as great as two thousand dollars, exclusive of costs. And respondent denies that the entire value of the lands and premises to which plaintiffs allege they have the title amount to as much as two thousand dollars, and denies that the entire value of said lands and premises does not exceed the sum of one thousand dollars. And this respondent denies the jurisdiction of this honorable court for the reason that the plaintiffs have a full and adequate remedy at law.

And having fully answered the said bill of complaint, this respondent prays that he may be hence dismissed with his reasonable costs and charges, in this behalf most wrongfully sustained.

WM. J. RAINEY,
GEORGE SHIRAS, 3D,
Counsel for Respondent.

14 STATE OF PENNSYLVANIA, } ss:
Western District, }

Personally before me came William J. Rainey, the above-named respondent, who, being duly sworn, deposes and says that the statements contained in the foregoing answer, so far as the same are made of his own knowledge, are true, and so far as the same are made upon information and belief he believes them to be true.

WM. J. RAINEY.

Sworn and subscribed this 4th day of November, A. D. 1891.

GEO. H. LEPPER,
Notary Public.

Filed November 4, 1891.

Replication.

The replication of Geo. W. Herbert and Thos. H. Herbert, complainants, to the answer of W. J. Rainey, defendant.

These repliants, saving and reserving to themselves all, and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants will be ready to aver and prove, as this honorable court shall di-
15 rect; and humbly pray, as in and by their said bill they have already prayed.

J. M. GARRISON,
Solicitor for Complainants.

Filed November 9, 1891.

Motion to Amend Bill.

The complainants move the court for leave to amend their bill filed in this case by adding thereto the name of Henry Herbert and Margaret Herbert as complainants, the said Henry and Margaret Herbert being lessees of the property of the complainants which is involved in this case for the life of the said Henry and Margaret and the survivor of them, the said lease having been granted to the said Henry Herbert by the said George W. and Thomas H. Herbert on the 3d day of December, 1885, and being recorded in the office for the recording of deeds in and for Fayette county, Pennsylvania, in Deed Book No. 63, page 468.

And now, April 11, 1892, a rule is granted on the defendant to show cause within ten days after notice to his counsel why the within motion to amend the bill should not be allowed.

M. W. ACHESON,
Circuit Judge.

Filed April 14, 1892.

Objections to Allowance of Amendment to Bill.

And now, to wit, April 25, 1892, comes the defendant by
16 George Shiras 3d, his solicitor, and shows cause against the granting of the order of amendment of the plaintiffs' bill moved for by his solicitor on the 11th instant, as follows:

1. The record shows no application on the part of Henry Herbert and Margaret Herbert to intervene or become parties to the plaintiffs' bill, and without such application the court has no authority to make them parties plaintiff.

2. The record shows no affidavit in support of the proposed amendment, as required by the rule of court.

3. The record shows that this matter contained in the proposed amendment was known to the plaintiffs prior to the date of the filing of their original bill.

4. The record shows that the testimony of both plaintiffs and defendant had been closed before the date of the said motion, and that large costs had been incurred by defendant in defending this cause as it stood upon the original bill.

5. The record of the deed recited in said motion shows the said Henry Herbert and Margaret Herbert are not lessees of the lands described in this original bill, but are life tenants of the same, and that the said George W. Herbert and Thomas H. Herbert have no interest therein except as remainder men.

6. The proposed amendment, if allowed, would substitute an entirely new and different cause of complaint for that set forth in said original bill.

And for the above reasons the defendant objects to the granting said motion.

GEORGE SHIRAS, 3D,
Solicitor for Defendant.

Filed April 26, 1892.

17 *Petition for Amendment to Bill and Affidavit.*

Petition to appear, etc.

To the Honorable M. W. Acheson, judge of the said court:

Your petitioners, Henry Herbert and Margaret Herbert, his wife, pray your honor to be substituted on the record of the above-stated case as complainants, together with the complainants already named *nunc pro tunc* as of the time of the beginning of the said action, your petitioners being interested as appears by exhibit offered in evidence by defendant in the said cause of action by title conveyed by the said complainants, and being now, as they were at the time of the beginning of the said action, in possession of the premises involved as aforesaid in the said suit.

his
HENRY x HERBERT.
mark.

her
MARGARET x HERBERT.
mark.

Witness to marks:
MISS MATTIE HERBERT.
O. L. SCHROYER.

FAYETTE COUNTY, *ss:*

Henry Herbert and Margaret Herbert, being duly sworn, say that the facts as set forth in the foregoing petition are true and correct as they verily believe.

Sworn and subscribed before me this 21st day of May, 1892.

C. O. SCHROYER,
Notary Public.

[SEAL.]

ALLEGHENY COUNTY, *Pennsylvania*, } *ss:*

Edward Campbell, of counsel for the complainant in the above-stated case, having been duly sworn, says that he prepared
18 the complainants' bill in this case, and that at the time he did so he was under the impression that the title to the said Herbert property involved therein was in George W. and Thomas H. Herbert, and that he was not aware of the fact that the said George W. and Thomas H. Herbert had conveyed any right therein to Henry Herbert and wife, and that he therefore inadvertantly omitted to join the said Henry Herbert and Margaret, his wife, as complainants in the said bill in equity.

That the fact of the said conveyance to the said Henry Herbert and wife first came to this affiant's knowledge upon reading the offer of defendant's counsel before the examiner in this case of the said deed of George W. Herbert and others to Henry Herbert and wife after the taking of the testimony before the examiner in this case had closed.

Your petitioner, therefore, being still of counsel for the said complainants, prays leave to add the names of the said Henry and Margaret Herbert to the said record as complainants, as of the time of the beginning of the said action.

EDWARD CAMPBELL.

Sworn and subscribed before me this 21st day of May, 1892.

JOHN R. WILSON,
Justice of the Peace.

Filed June 7, 1892.

Order Allowing Amendment to Bill.

June 7, 1892, the plaintiffs' motion to amend the record in this case came on to be heard and was argued by counsel, and thereupon, upon consideration thereof, it is ordered that Henry Herbert and Margaret Herbert, life tenants of the real estate involved in this case, have leave to join as plaintiffs, *nunc pro tunc*, as of
19 the beginning of this action, and that the record be amended accordingly; the respondent to have twenty days within which to file an amended answer, if he desires to do so; the question of costs reserved.

BY THE COURT.

Filed June 7, 1892.

Answer to Amended Bill.

The answer of defendant to the plaintiffs' bill as amended by the addition of Henry Herbert and Thomas Herbert as parties plaintiff.

This respondent saving and reserving to himself all and all manner of exceptions and objections to the plaintiffs' bill of complaint, both as it stood originally and as amended for answer to said bill as amended, says:

1. That the value of the matter in dispute, exclusive of costs, does not now and did not at the time of the commencement of the suit exceed the sum of two thousand dollars, and is and was less than the sum of two thousand dollars, and that the value of the lands and tenements described in the plaintiff's bill and belonging to the plaintiffs does not exceed the sum of nine hundred dollars, and the value of the estate and interest of the said George W. Herbert and Thomas H. Herbert in said lands and tenements does not exceed the sum of six hundred dollars, and that the value of the interest and estate of the said Henry Herbert and Margaret Herbert therein does not exceed the sum of three hundred dollars. And this respondent is advised and believes that the life tenants and remaindermen, parties to the suit, hold by different titles and that the joinder of said parties as plaintiffs cannot avail to give this honorable court jurisdiction of this bill if the court could not entertain jurisdiction of a bill by the remaindermen alone, in so far as the amount in controversy is concerned. And this respondent denies the jurisdiction of this honorable court in the premises, and prays that he may have the benefit of this answer in like manner as if he had pleaded to the jurisdiction.

2. And this respondent hereby makes his original answer filed in this cause part of this his answer to plaintiffs' amended bill, and denies the equity of the plaintiffs as therein he has made denial. And this respondent prays the court that he may be hence dismissed with his reasonable costs and charges in this behalf most wrongfully incurred.

WM. J. RAINEY.
GEORGE SHIRAS, 3D,
Counsel for Respondent.

[SEAL.]

STATE OF OHIO, }
Northern District, } *ss:*

Personally before me came William J. Rainey, the above-named respondent, who, being duly sworn, deposes and says that the statements contained in the foregoing answer are true.

WM. J. RAINEY.

Sworn and subscribed this 5th day of July, A. D. 1892.

B. K. BEACH, *Dep. Clerk.*

Filed July 6, 1892.

21 *Replication to Answer to Amended Bill.*

And now, July 6, 1892, come the plaintiffs, George W. Herbert, Thomas H. Herbert, Henry Herbert and Margaret, and renew the general replication heretofore filed in this case, and join issue on the matters alleged in the original answer and amended answer now on file in this case.

EDWARD CAMPBELL,
J. M. GARRISON,
Attorneys for Plaintiffs.

Filed July 6, 1892.

Order Appointing Examiner.

And now, November 13, 1891, by agreement of counsel, Mrs. L. D. Iams is appointed examiner in the above case.

BY THE COURT.

Filed November 13, 1891.

To the honorable the judge of the circuit court of the United States for the western district of Pennsylvania:

The undersigned examiner, appointed by your honorable court to take the testimony in the above-entitled cause and report the same to court (as per certificate of appointment hereto annexed), respectfully reports:

That, pursuant to notice given to counsel for parties interested, she met said counsel with some of the said parties in interest, at the office of J. M. Garrison, Esq., No. 96 Diamond street, Pittsburgh, Pa., at 10 o'clock a. m., and thereafter by adjournment from time to time, at which times testimony was taken on behalf of complainants and defendant, said complainants being represented by J. M.
22 Garrison, Esq., and Hon. Edward Campbell, and the defendant by Messrs. C. C. Dickey and Geo. Shiras 3d.

The testimony taken by me in short-hand and afterwards reduced to typewriting, is herewith returned.

Respectfully submitted.

LUCY DORSEY IAMS, *Examiner.*

Pittsburgh, Pa., April, 1892.

In the Circuit Court of the United States for the Western District of Pennsylvania.

GEORGE W. HERBERT *et al.*
vs.
WILLIAM J. RAINEY. } No. 30. Nov. Term, 1891. In Equity.

And now, to wit, November 30, 1891, it is hereby agreed that the examiner shall take testimony in this case by questions and answers, in short-hand, and shall afterwards draw out the same at length in

typewriting, without requiring the depositions to be read over to the witnesses and signed by them as provided by the equity rules.

J. M. GARRISON,
Attorney for Plaintiffs.
GEO. SHIRAS, 3D,
Attorney for Defendant.

And, now, to wit, Monday, November 30, 1891, at 10 o'clock, a. m., pursuant to notice given, parties met at office of J. M. Garrison, No. 96 Diamond street, Pittsburgh, Pa.

23 There being present J. M. Garrison, Esq., of counsel for plaintiffs, and George Shiras 3d, Esq., of counsel for defendant.

GEORGE WHIPKEY being duly affirmed, gave the following testimony on behalf of the plaintiffs:

Direct examination by Mr. GARRISON:

Q. What is your age?

A. My age will be 57 years on the 6th day of July next. I was 56 years old the 6th day of last July.

Q. Where do you reside?

A. I reside near Dawson, Fayette county, Pennsylvania.

Q. How far do you live from the residence of Thomas H. Herbert and George W. Herbert?

A. As near as I can tell you, it is not a quarter of a mile, but somewhere near that. It is just right across the hollow; I live up on the knoll, and he lives right across the hollow; I can see the house plant.

Q. How long have you lived there?

A. Well, I have lived there for the last 25 years.

Q. At the time you first knew this Herbert property, who was the owner of the land?

A. Who was the owner of the land?

Q. On which the house is now located? Do you know when the Youghiogheny River Oil Company purchased?

A. No.

Q. Who was the owner of this land before the Youghiougheny Oil Company purchased?

A. I won't tell you that; I am a coal-digger, and I take so little account of such things, I won't tell you anything I don't know.

Q. State if there was at one time laid out on this land that you speak of a plan of lots with streets and alleys.

A. Well, now, I can't tell you that, neither; I can't tell you anything I don't know. All I can recollect, it was staked off and I seen the stakes, but what time it was——

24 Q. I am not asking you what time it was, but I ask you if, at one time, there was a town plan laid off on this land, with streets and alleys?

A. Yes; there was.

Q. But you don't recollect exactly what date that was?

A. No; I don't.
Q. Do you know who caused that to be done?
A. I don't know; no.
Q. Do you recollect when this Herbert house was built on this lot?
A. I do remember that.
Q. How was it built with reference to a street, if any, or streets in that plan?
A. Well, how do you mean to take me in that?
Q. Well, I mean to ask you if it was located on the corner of two streets in the plan of lots to which you refer?
A. Yes, sir.
Q. What was the names of those streets?
A. One was Sedgwick, and the other was Front street.
Q. What was this town called?
A. Sedgwick, if I ain't mistaken.
Q. Who built this Herbert house, as you recollect?
A. Well, it was Mrs. Elizabeth Dean.
Q. Is the house flush with either of those streets?
A. Sir?
Q. Is the house built out even with Front street?
A. It is; yes.
Q. You saw those pins there on the ground very frequently?
A. I did, sir; for I passed there every day going to and from my work, back and forth.
Q. Did you know when the building was going on?
A. I did.
Q. And saw how the building was erected with reference to those two streets?
A. Yes, sir; I did.
Q. State whether those two streets have ever been used, from the time the plan of lots was laid down to the present time.
25 A. Well, they have been used more or less every day. It's the only way that Mr. Herbert could get in,—those streets and the road. There is a county road intersects with the street. Now it is blocked up so they can't do anything with it.
Q. By whom is it blocked up?
A. By Mr. W. J. Rainey.
Q. What is it blocked up with?
A. With coke ovens.
Q. This Front street in front of Herbert's house was used as a driveway and a street?
A. Yes, sir.
Q. And has been ever since that town was laid out?
A. Yes, sir.
Q. And you say the same thing as to Sedgwick street?
A. Yes, sir; I do.
Q. What is the condition of the construction of these coke ovens on Front street at the present time?
A. Why, a bad condition.
Q. Well, what is located on that street?

A. Well, there is a wall built on it, on each side, in about six feet of the ovens, or the house, and there is ovens built down pretty near against the house on the street on both sides.

Q. What work, if any, has been done toward the construction of those ovens recently?

A. There has been 19 *and* 20 ovens built there recently,

Q. State whether or not this town of Sedgwick has been known as a town and plan of lots, by common repute in the neighborhood, ever since it was laid out.

A. It is; people all claim around there—that's what they call it.

Q. It was known as the town of Sedgwick?

A. Yes, sir.

Q. State if these two streets you speak of, Front street and Sedgwick street, were generally understood and known by the community as streets in that town.

26 A. Yes, sir; as far as my ability can tell you that is what the people there called it.

Q. They are spoken of generally in that way in the community?

A. Yes, sir.

Cross-examination by Mr. SHIRAS:

Q. How far do you reside from the Herbert house?

A. About a quarter of a mile, as near as I can tell you.

Q. Where are you employed now?

A. I am employed by Frick & Co.

Q. What is your business there?

A. Digging coal.

Q. Do you own any property there?

A. Yes, sir; I do.

Q. How long have you owned it?

A. About 21 years.

Q. When was it that you first noticed these stakes that you speak of?

A. That I don't tell you, for I can't tell.

Q. Give your best recollection.

A. Well, as I said before, I think it's nearly fifteen years ago, as I can recollect.

Q. When did you last see those stakes there?

A. Well, I seen some of them, I can safely say, two or three years ago, and I might find some now.

Q. Were they along what is alleged to be Front street?

A. Yes, sir.

Q. You saw them there some three years ago?

A. Yes, sir.

Q. Who put those stakes down there?

A. The surveyor put them down; at least I saw them on the ground there.

Q. Whose surveyor was it?

A. I can't tell you?

Q. You don't know whether it was Mr. Rainey' surveyor?

27 A. I don't know anything about that.

Q. How do you know that this street was called Front street?

A. That's what they told me; that was laid out and the street was numbered.

Q. Who told you that?

A. The numbers were on the stakes.

Q. But where did you get the name of the street?

A. That's just what they told me; it was Front street.

Q. Well, who told you?

A. The people.

Q. Within the last two or three weeks?

A. No, sir; it was always Front street, ever since I knowed it was laid out.

Q. When was this Herbert house built by Mrs. Dean?

A. I won't tell you that.

Q. Give us your best recollection.

A. Well, it was built shortly after—commenced building shortly after this town was laid out.

Q. Don't you know that the house was built there before the alleged town was laid out; that there was a house there on the present site?

A. No, sir.

Q. What time were you first there; how long have you lived there?

A. I have been living where I live now for about 22 years.

Q. How wide is this street?

A. I think they said 32 feet, if I ain't mistaken; I didn't measure it.

Q. How many houses are in this alleged town?

A. Only one.

Q. Do you mean to say there are no other houses in that neighborhood?

A. Oh, yes; there are houses close around, but there is just no other house built in what is laid out.

28 Q. How far did these streets and alleys that you have spoken of extend from Herbert's house?

A. I don't know.

Q. You don't know the size of this alleged town?

A. No, sir.

Q. You have testified that this street has been used by wagons and teams?

A. I have.

Q. Is the street graded?

A. A part of it was graded; yes.

Q. Is it paved?

A. No, sir.

Q. What is there to indicate that it is a street to-day?

A. No indication of a street to-day; it's all torn up.

Q. No indication of a street there to-day?

A. No, sir; it's all tore up.

Q. But in front of the house, what is there to indicate a street in front of the house?

A. That is the street I was alluding to; it's all tore up.

Q. Who tore it up?

A. W. J. Rainey.

Q. Has he built in front of the house?

A. Yes, sir.

Q. Are you certain of that?

A. Yes, sir, I am; what we call the front, next the railroad.

Q. No; but I mean in front of the Herbert house. Where does Front street run to?

A. What we call Front street is next the railroad.

Q. It runs to the railroad?

A. Yes, sir.

Q. There is no crossing at the railroad, is there?

A. There was.

Q. Is there now?

A. No; not now, for it is torn up.

Q. When was there a crossing there at the railroad?

29 A. There was a crossing there before W. J. Rainey commenced to build his ovens there.

Q. How long ago?

A. About a year ago.

Q. Don't you know that that was a county road?

A. It was a county road, connecting with the street.

Q. And it was called the county road?

A. It was.

Q. Where did it run?

A. Well, it run—that county road do you mean?

Q. Yes; at that time.

A. It led to Broadfield and Hickory square.

Q. No; I mean with reference to the Herbert house.

A. The county road crossed the railroad a little above Mr. Herbert's house, and hit the street a little above the house; up towards Connellsville.

Q. Isn't that the road that was used by wagons and teams?

A. No; not for the last few years; there was another road came in there, too.

Q. Then when you speak of teams and wagons using a certain highway there, it was this county road that crossed the railroad track. How has that county road been changed, do you know?

A. It has been changed by Mr. Rainey tearing up the crossing.

Q. Who ordered the change of that road?

A. I don't know.

Q. You don't know whether the supervisors changed the road to the rear?

A. No; I don't.

Q. What wagons have you ever seen using Front street; whose wagons?

A. Well I have seen Mr. Strauss', and I have seen Mr. Rainey's; Mr. Rainey used to drive up there frequently with his wagons.

Q. That was on what was then the county road?

30 A. On what they called the street, anyhow.

Q. You say this house is built on the corner of Sedgwick and Front streets?

A. I do.

Q. How do you know that?

A. Just as I told you before; people said it was Front street, that's all I can tell you.

Q. Well, are you certain it was Sedgwick street?

A. That's what it was claimed to be.

Q. When you speak of it's being rumored or spoken of as a town, are you prepared to say that you have heard any statements as that recently, within the last five or six years?

A. I did; yes; as far as I can tell you. I heard it spoken of as a little town.

Q. Of one house?

A. That's what they gave it the name of.

Q. Well, it was regarded as a joke, was it not?

A. I can't tell you that.

Q. There was nothing there to indicate a town?

A. Oh, yes, there was right smart, at one time.

Q. This one house that was there, you don't know when that was built certainly?

A. I can't tell you that certainly.

Q. You don't know whether it was built before or after the alleged laying out of this town?

A. I suppose it was built when it was laid out.

Q. You aren't positive of that?

A. No, sir.

Redirect examination by Mr. GARRISON:

Q. You say that this house was built by Mrs. Elizabeth Dean?

A. I do.

Q. How soon did she build that house after she purchased there?

31 Counsel for defendant objects to the question as leading, and as assuming that Mrs. Dean did build it after she purchased.

A. You say, Mr. Whipkey, that the ovens are built up in front of Herbert's house. I want you to explain that and state what you mean by that. Is there an opening in the line of ovens immediately in front of Herbert's house?

A. Yes, sir, there is an opening; but then this wall they have started to build is right in front of his house.

Q. There is an opening in the ovens right immediately in front of Herbert's house?

A. I don't know whether you call it the front; down next to the road.

Q. If that opening were closed up, how near would it bring the ovens to Herberts' house?

A. It would bring it within six feet, I am giving a big measure, too.

Q. How far is each end of the ovens, where they leave off on each side, how far is that from Herbert's house?

A. Where the ovens leave off?

Q. Yes.

A. Well, the one end, as near as I can tell you, may be 50 feet.

Q. And how far is the other end?

A. To the best of my ability, it might be 60 or 70 feet.

Recross-examination by Mr. SHIRAS:

Q. When did Mr. Rainey first commence to construct these ovens?

A. I won't tell you just when he commenced.

Q. When did he first break ground, do you remember that?

A. I don't.

Q. Are you able to tell, then, whether he had broken ground, commenced the substructure, before the purchase of this property by the Herberts?

32 A. You mean——

Q. Didn't he begin the foundations for these ovens before the Herberts purchased the property in 1885?

A. Oh, no; not before that.

Q. He had ovens in that neighborhood then, hadn't he?

A. No, sir; he had right across the river.

Q. When did Mr. Rainey first buy this property?

A. I don't know that.

Q. Are you prepared to say that Mr. Rainey had not commenced the erection of coke ovens on this alleged Front street prior to the purchase of the property by the Herberts?

A. I am. They had bought this property before ever Mr. Rainey had any coke ovens, or broke any ground for them.

Q. Has Mr. Rainey erected some houses in that neighborhood?

A. He has; yes, sir.

Q. Were they built with regard to any streets or alleys, or highways there?

A. They was.

Q. Do you mean to say that those houses are built with reference——

A. There are two of them now that Mr. Rainey has built himself.

Q. He has built, I understand, a number of houses for his employés?

A. He has built two houses; they are double.

Q. What street are they upon?

A. I won't tell what street they are on?

Q. How many streets are there in this town?

A. I won't tell you that. I'm a coal digger.

Q. Then you only recollect Front street and Sedgwick street?

A. Yes. I seen them stake off all of it, clear up the hill, but I don't know the names of them or nothing.

Q. When did you see them staked off?

A. Well, as near as I can tell you, about 15 years ago.

33 Q. And you say those stakes are still there?

A. I say I suppose I could find some of those stakes there to-day, if I would look.

Q. You saw some stakes there about three years ago?

A. I did.

Q. And you don't know who employed the engineer to put those stakes down?

A. No, sir; I don't.

DAVID H. WINGROVE sworn on behalf of plaintiffs.

Direct examination by Mr. GARRISON:

Q. What is your age?

A. 58 years old on the 19th of last September.

Q. Where do you live?

A. I live within about 300 yards of where Mr. Herbert's property is; it may be 350, not more than that.

Q. How long have you lived there?

A. I built that house in 1864, immediately after I returned from the army.

Q. And you have lived there ever since?

A. The greater part of the time; at one time I was away six months, and one time away a year; but I was immediately across the river from this property. I have never been away more than a mile from there since.

Q. Who owned the land on which this Herbert house is located, at the time you first knew of the land?

A. A man by the name of McCormick, I believe; I am quite confident that he had possession of it.

Q. To whom did he then sell?

A. To the Youghiogheny Oil Company.

Q. Do you know anything about the laying off of a town there on that land, by the name of Sedgwick?

A. Yes; I have a recollection that there was a town laid out there.

Q. Did you ever see the plan of that town on paper?

34 A. I saw it; yes, sir.

Q. Who had that plan or plot?

A. A man by the name of William Jones; he was an agent of the oil company; he is dead now.

Q. Do you recollect any of the streets on that plan?

A. I recollect of seeing streets, but as far as the names go I recollect Front street and this Sedgwick street; the other names of the streets that run up from the railroad I can't recollect; but there were other streets. Front street was laid right along the railroad, and Sedgwick run at right angles, and there was another between that and the line of the old Fayette works, but what the name of it was, I can't recollect.

Q. Have Front street and Sedgwick street been used as highways since that town was laid out?

A. I can't say as Sedgwick street was used, only here lately, since there was a new road; but Mr. Herbert would get his coal and such things as that hauled in on Sedgwick street; but Front street was used; the public road came across not quite to his house. It was not graded or anything of that kind, but it was used as a street to haul things, and it was also used to deliver goods into where Rainey has built these other houses.

Q. State whether or not you saw the pins there on the ground, indicating the streets and alleys as laid off on this plan that you speak of.

A. Frequently, sir.

Q. Well, how long ago?

A. Well, I can't say how long ago it has been since I seen them; I suppose I saw them there, up through the woods part of the property—I think I seen them there anyhow not more than three years ago. A part of the place was woods, and there is timber standing there yet; they laid the whole thing off in lots, if I can recollect right.

Q. State how this house of Herbert's is located with reference to Front street.

A. It is right on the corner of Front and Sedgwick streets.

35 Q. How far each way from Herbert's house has Front street been used as a street and highway, since that plan of lots was laid out, as near as you can recollect?

A. Well, of course, it was used—I can't tell you how far one way, because it run into the public road.

Q. How far from the Herbert house did it intersect the public road?

A. The public road came right up across the railroad, forninst the Herbert lot; I can't tell you how far it was from the house to where the public road crosses it; up at the end of the lot it wasn't that far back—not back as far as the alley was laid out.

Q. But Sedgwick street, in front of the Herbert house, was used as a street or highway, for people passing back and forth?

A. It was, until shut up; people could go as they pleased through there till Mr. Rainey had built his stable there, and no one can now; you could still get through, but he has taken part of the street.

Q. How is Sedgwick street now occupied?

A. It is occupied with part of Rainey's stable.

Q. Rainey's stable is on part of it?

A. Yes, sir.

Q. Well, what is on the balance of Front street? I mean Front street instead of Sedgwick street. How is Front street occupied now?

A. It is occupied by building material and coke ovens.

Q. Whose are they?

A. Rainey's.

Q. How near do these coke ovens come up on each side of Mr. Herbert's lot?

A. Well, at the far end of his lot next the alley, they come within a very few feet of it; it might be 10 or 15 feet, or maybe 20. In the front I suppose it is about 50 feet, that is next to Sedgwick street. And they have got a wall for the ovens built within about two feet of the house, and if they build the ovens they will come within one and a half feet of the house.

36 Q. Have you noticed any work being done there about the construction of those ovens recently?

A. I have.

Q. How recently?

A. Well, they were laying tracks for the ovens on Sedgwick street last week.

Q. Laying tracks of ovens?

A. Yes; so they could charge the ovens.

Q. How close were they coming with this construction to the Herbert lot?

A. Well, the iron was laid—of course, it was not spiked down—but the iron was laid last Sunday week ago. I was up there when they were working at the track, and the iron was put along within 20 or 30 feet of his house. It was railroad iron to run his charger on.

Q. You recollect when Mrs. Dean bought this lot, do you?

A. Well, I can't just exactly say.

Q. You recollect the occasion of her buying?

A. I think it was in 1872 or '73.

Q. Of course, her husband built her house there; he commenced immediately after she bought it.

Q. And that house has been there ever since?

A. Yes, sir; that house has been there ever since. Of course, it got racked a good bit, but still it has been there, and people most generally occupied it since that. There has always been some person in the house generally.

Q. What was it originally built for?

A. Well, Mr. Dean, when he got that place, or Mrs. Dean, they intended to build it for a tavern stand, a hotel.

Q. A pretty large building?

A. It was about 32 feet one way and 16 the other, and then it has a large kitchen behind; a two-story house with a basement underneath, or a cellar under the whole business.

Q. What would you regard this property of the Herberts there as reasonably worth?

37 A. Well, I think it is worth about $2,500, that is, in the situation that it was before those ovens were put there.

Q. If those ovens are constructed as it seems to be contemplated, what would you say would be the value of this Herbert property?

A. Worthless; ain't worth anything.

Q. State where the front door of this house is, with reference to Front street.

A. They have a portico that comes right out from the front door.

Q. Does that front door open on Front street?

A. Out of the basement.

Cross-examination by Mr. SHIRAS:

Q. Have you seen or heard of this paper plan of lots within the last fifteen years, the one that was shown you by Mr. Jones?

A. No, sir; I had not seen it since Mrs. Dean was about to purchase that property.

Q. That was in about 1873?

A. Yes; about 1873; it may have been a little later or a little earlier; it ain't more than a year either way, because I was there at that time.

Q. This travel that you speak of using this particular tract of land was largely along the county road?

A. Of course it was.

Q. And the only travel from that county road along in front of the Herbert property was on the part of Mr. Rainey and Mr. Herbert?

A. That was the only travel that was necessary along there.

Q. And this was rather level land?

A. Level enough to drive along.

Q. You say that this street was neither graded or paved?

A. I do.

Q. And you could drive anywhere in front of the Herbert house?

38 A. Yes.

Q. How far were they accustomed to drive in front of that house—how close did they come to it?

A. They wouldn't come within 15 or 20 feet of the house, I suppose; because there was plenty of room.

Q. And they could drive sometimes 50 or 60 feet away from the front?

A. No; not quite 60 feet, because that would be on the railroad.

Q. How far is the railroad from the house?

A. I suppose about 50 feet from the house.

Q. Then they drove along between the railroad and the Herbert property?

A. Certainly.

Q. Do you remember the width of this alleged street?

A. I can't remember what it was, but enough for a common street.

Q. Sometimes they would drive close to the railroad, I suppose?

A. Yes, sir.

Q. Could they drive within a few feet of the railroad?

A. There was a little cut there; they could drive close to that cut, if they could cross the railroad; they had to get on a bank some four or five feet high to get on this road; it was nearly level.

Q. Where does this county road go now?

A. I don't think there is any there now; I think Mr. Rainey tore it up.

Q. You don't recollect whether that road was changed to the rear?

A. I have been there 27 years, and I don't know of that front road

being thrown away; there is a road to the rear, of course, but that don't say anything about this other road.

Q. When you speak of this town of Sedgwick, do you mean to have it understood that it is considered to exist there as a town now, or that such a town was projected at one time?

39 A. There was such a town laid off there.

Q. In 1873?

A. Yes, and of course it was laid out adjoining the old Fayette works there, and there was a town there and a lot of houses; but those works have gone down some years ago.

Q. And you don't know of any pins that exist there, unless it would be in the wooded portion of that tract?

A. I don't know of any on the cleared part.

Q. But you think perhaps in the portion that is timbered some of those stakes exist?

A. I think very probably; I have seen them there anyhow not more than three years ago.

Q. Do you know when the Herberts bought this property?

A. I can't recollect exactly what time; but it was along some ten years ago, anyhow, I reckon.

Q. When you speak of this Herbert property, don't you confuse that with a lot that was owned by Mrs. Herbert some years before?

A. Not at all. I know exactly where that lot was, too. And I know that lot was not on the same street; that is, was not on Sedgwick street; it probably run to Front street.

Q. Did they buy this lot before or after the Raineys bought the property—this particular lot on which the house stands?

A. I think they probably bought at the same time, or directly after Rainey bought the other property; I can't state exactly; but it is not more than 8 or 10, or 12 or 13 years ago, probably. I can't say, but I know the Herberts have lived there some 8 or 10 years, and they lived there before they bought the property.

Q. How many houses stand upon this alleged site of the town of Sedgwick?

A. Well, the Raineys have built a couple of big lots there, and there was an old log house standing there before, and this Herbert property, on the site that the town of Sedgwick was laid out on; and this old Fayette property was just adjoining it.

Q. Do you know whether the Rainey houses were built with reference to any plan?

40 A. I don't think they are.

Q. When were they built, do you remember that? Were they built prior to 1885?

A. They were built along about that time; '85 or '86.

Q. Don't you know, as a matter of fact, that this county road or this highway that you speak of now runs behind the Herbert property?

A. There is a road there, but I don't know anything about this other one being closed by the court and never heard of it; and, in fact, I don't think it could be, because there is only one man that lives on it, and that is Mr. Herbert himself. But I know it was used up

until Mr. Rainey—and I also know that the railroad had to keep the crossing open, up till Mr. Rainey tore it up.

Q. Upon which side of the house did the Herberts originally have access to it?

A. At the front; but now they have to get in the best way they can.

Q. Then there is an entrance in the rear?

A. They can get down Sedgwick street with a wagon, but it is dangerous work.

Q. But on the other side?

A. They can't get down, because Rainey has blocked it up.

Q. Well, in the rear?

A. I suppose they could get down the alley, but they couldn't get near the house.

Q. What is the size of this lot upon which the house stands?

A. I think there's two lots, about half an acre; I think they own two lots there.

Q. What do you consider that property, without the house, worth?

A. Well, they were sold for $300, I think; but then there is a good deal of improvement on it since that time.

Q. In what respect are there improvements?

41 A. They have got a good orchard on it, and some nice grapes and other fruit there, and they put a good well down there; and I couldn't tell you how much improvement they have put there since.

Q. How old is this house?

A. They commenced building it in 1873.

Q. Is it a frame house?

A. It was put up a board house, and has been weather-boarded since; boards put up and down in the first place.

Q. What do you consider the house worth, excluding the value of the lots?

A. Well, I'm no carpenter, and I ain't a judge of lumber, and I can't tell you exactly what the house would be worth.

Q. You don't know whether it would take more than $600 or not, to build the house?

A. Yes, I know it would take more than $600 to build the house.

Q. Do you know how much the Herberts paid for the house?

A. No; I don't.

Q. The house and lot I mean?

A. I have no idea, but I know they have put a great deal of improvement there since.

Q. That house is occupied now by the Herberts?

A. Yes, sir; at the present time as a residence for the Herberts.

Q. Do you say that the entire access is cut off to this house were the ovens to be built upon Sedgwick and Front streets?

A. I say it is cut off entirely, without he comes in on his own property.

Q. Without he comes in on his own property?

A. Yes, sir.

Q. Isn't it accessible in case he comes in on his own property?

A. Of course he could get in on his own property.

42 Q. And if he did this, nevertheless the property would be worth nothing?

A. If they run these ovens, the property is worthless; they couldn't live there; they couldn't raise nothing.

Q. You mean it is worthless as a residence?

A. Yes; and worthless as a lot, because they couldn't raise anything on it and couldn't live there.

Q. And the property would have no market value at all?

A. I suppose it would be worth something to Mr. Rainey, but to nobody else; you couldn't give it away to anybody else.

Q. How do you estimate that this house is worth $2,500?

A. I estimate it according to the value of property around it. I own a little property within 350 yards of it, and I know about how property sells around it and the situation of this property before the ovens were built.

Q. At what does property sell there an acre?

A. You hardly ever hear of people buying by the acre.

Q. How much do you own?

A. I have about an acre there.

Q. How much did you pay for it?

A. I paid $55 an acre; but that has been 25 years ago.

Q. At what do you value it now?

A. I wouldn't take less than $400 for the ground alone.

Q. $400 for the acre?

A. Yes, sir.

Q. You say you are not able to compute the actual value of the house?

A. I am not able to state what the house is worth, but if I owned the property, I wouldn't take, as I said before, less than $2,500, in the situation it was in.

Q. This property of yours is how far from this lot?

A. About 300, or maybe 350 yards.

Q. Where do you work?

A. I work for the Jackson Mining Company; James Cochran.

43 Q. Did Mr. Cochran own this Herbert lot at one time?

A. He did; yes. His boy bought it; I suppose he sent him to buy it. Thomas B. Dean got me to try and sell the property for him, and I told Cochran about it, that is the son of James Cochran, and he asked me where he could find him, and I told him; he didn't buy it of me; I could have sold it to him; I had the power to do it.

Redirect examination by Mr. GARRISON:

Q. State whether or not this town of Sedgwick has been known by common repute in the neighborhood there, ever since that town was laid out, among the neighbors.

A. Common repute said it was laid out as a town; yes.

Q. And you say the same as to these two streets, Sedgwick and Front streets?

A. All the neighbors and every person that lived around there knows where those streets are.

Counsel for plaintiffs offers in evidence a plan which is marked Exhibit A, and which is shown witness.

Q. Look at this plan or drawing, and state whether it represents the location of Front street and Sedgwick street, as laid out on the plan that you saw with Mr. Jones, and according to the pins that you speak of that you saw on the ground.

A. Yes, sir; that is right.

Mr. SHIRAS:

Q. Then, in regard to this plan, all that you are prepared to testify, is that you believe that this is the proper location of the Herbert lots, so far as Front street and Sedgwick street are concerned?

A. I do.

44 Counsel for defendant states that he will not object to the offer of this plan, if the same is only to be used for the purpose of convenience in the examination of the witness; but that he does object to the offer if it is offered for the purpose of having it go in as an exhibit to be used as evidence in itself.

GEORGE WHIPKEY recalled on behalf of plaintiffs:

Direct examination by Mr. GARRISON:

Q. What would you regard this Herbert property as reasonably worth, before these coke ovens were constructed or started there?

A. Well, I value that property, at the lowest I would be willing to give for it—I would be willing to give $2,000 for it.

Cross-examination by Mr. SHIRAS:

Q. Is this land very similar to land in the neighborhood there?

A. Mr. Herbert's?

Q. Yes; to the adjoining properties there.

A. Yes, sir.

Q. Have you had any experience in the purchase and sales of property in that locality?

A. I have a good bit.

Q. What would ground of that nature be worth there without any improvement?

A. You couldn't buy a quarter of an acre of ground there for less than $250.

Q. A quarter of an acre?

A. Yes; just where I live.

Q. You say, then, that property there is worth a thousand dollars an acre?

A. You couldn't buy some of it at that.

Q. I mean ordinary, unimproved ground there, such as this?
45 A. No, I wouldn't value it that high, according to that, but I say there is property there that would average that today.

Q. What I want to get at is, what the value of land is per acre there, of that character, in that locality. I don't mean the most valuable land there, but ordinary land of this character. What does it sell per acre in that neighborhood?

A. That depends on different locations, as to where the land lies, as to what you could buy it for. You might buy a farm for $150, or for $50 an acre, just according to how the farm is located.

Q. But what I want is, in a general way, your estimate of land of this character by the acre. Couldn't you give a rough estimate?

A. Well, I suppose you couldn't get it for less than $250 an acre, and that's a very low figure.

Q. Where is your property?

A. In Fayette county, just right above Dawson.

Q. How far from this property?

A. About a quarter of a mile.

Q. How many acres have you?

A. Four acres.

Q. What did you pay for them?

A. I paid $1,800.

Q. Including the improvements?

A. I put the most of the improvements on it myself.

Q. There was a house on this property when you bought it?

A. There was a kind of a shed when I bought it.

Q. This Herbert house is an old structure?

A. No; it's a good house.

Q. What do you consider that house worth, without reference to the land?

A. I am no carpenter, and I made no estimate of the lumber; and I can't tell you about the carpenter-work, because I'm no judge about that.

Q. Do you know how much the Herberts paid for this property?
46 A. Yes, sir; they paid $1,000 to Mr. James Cochran for it.
Q. When did they buy it?
A. I won't tell you that.

Redirect examination by Mr. GARRISON:

Q. What would you consider this Herbert property worth, if those ovens are constructed and operated as seems to be contemplated?

A. I wouldn't give you a pin for it; wouldn't give you anything at all.

Mr. SHIRAS:

Q. You would consider it as having no market value whatever?

A. I wouldn't have it; a man couldn't live in it under those conditions.

Q. You wouldn't take a deed for this property, then?

A. I wouldn't take a deed for it with those coke ovens right there. You might make me a deed and I wouldn't accept of it; that's the truth.

Q. Then you evidently don't consider this structure to be very valuable, the materials in it.

A. That don't matter.

Q. Do you consider this house of any value whatever, the materials in it?

A. It wouldn't be to a man that lived in it?

Q. Couldn't he move it off?

A. Mr. Rainey might move it off; but leaving it stand where it is I wouldn't live in it—no man could live in it.

Q. Do you consider that the Herberts paid a fair value for the property when they bought it?

A. Well, I suppose they did.

Hearing adjourned to meet at 1 o'clock p. m.

47 The hour of 1 p. m. having arrived, the taking of testimony on behalf of the plaintiffs in this case was resumed.

GEORGE H. KUHN, being duly sworn, testifies as follows:

Direct examination by Mr. GARRISON:

Q. Where do you live?

A. Dawson borough, Fayette county.

Q. How long have you lived there?

A. Since October, 1884, I have lived in Dawson.

Q. How far do you live from the Herberts, at Sedgwick?

A. A little over half a mile.

Q. Do you know the property that they own and live in?

A. Yes, sir.

Q. How long have you known it?

A. I have known it for the last ten years; more particularly so since 1884. I do my work right in front of their house most always.

Q. What is your business?

A. Locomotive engineer on the B. & O. railroad.

Q. Do you know of Front street and Sedgwick street in the town of Sedgwick?

A. Yes, sir; I do, in a general way.

Q. How did you get your knowledge of those two streets?

A. From the residents around in the vicinity.

Q. How does this Herbert house stand with reference to Front street?

A. It stands right on the corner of Front and Sedgwick streets as they call the streets, I believe, there.

Q. Since you have known it, how have these two streets been used?

A. Well, they have been used as other streets, for the use of vehicles, and so on, going and coming to and from those places up around the works there.

48 Q. Mr. Herbert's house stands flush with Front street?

A. Yes, sir; as I understand it, it does.

Q. His front door opens out onto Front street?

A. Yes, sir.

Q. Has he any means of access to the front of his house except through Front street?

A. No, sir; he has not.

Q. What is the condition of Front street now?

A. Well, it is partly built with ovens on both sides of the house, and there is a base wall—a trench along where they lay their wall for the ovens, they have got it built up in front of the house.

Q. In front of the house?

A. Yes, sir; that base wall is level with the house. They have dug the trench and they have the stones all laid in on there and they have that all built up level with the ground, in front of the house. I suppose they have got about five or six feet of the house.

Q. When has the construction of this base wall been done?

A. This last summer and fall along.

Q. What is the width of that opening in the ovens in front of the Herberts house?

A. That is, between the ovens on each side of the property?

Q. Yes.

A. Well, I would suppose, on this side west of the house, 50 feet, I would say, maybe more, maybe a little less than that; and on the other side I would suppose 30 or 40 feet; but the dump-out where they fill in, the ovens is almost up against their fence, that is on the east side of the house.

Q. If those ovens were constructed as indicated by the base wall that you speak of there in front of Herbert's residence how close would the ovens come to Herbert's door?

A. I don't see how they could build them without tearing away a part of the house. They would be right jam up against it, at any rate.

49 Q. If those ovens were operated for the manufacture of coke, would it be possible to occupy that dwelling?

A. I wouldn't think so.

Q. Why?

A. Well, on account of the smoke and the heat from the ovens. I don't see how it could help setting the house on fire, the place that it comes out of the top of the ovens being so close; the wind generally draws that way.

Q. How recently have you seen work done on this base wall in front of the house?

A. Well, I suppose, probably within the last couple of months; the last two or three months, likely; I don't just remember.

Q. By whom was it done?

A. Well, I suppose by the W. J. Rainey Coke Company, the men that put up the ovens on the other side of the house. There is a lot of their material put off there, sand and stone and brick, and everything like that. We have the handling of all of it to do.

Q. Where is that material located at the present time?

A. The stone is dumped right in front of the house; the sand and everything like that is carried right in front of the house.

Q. Who directed it to be placed there?

A. Their boss there at the ovens; Mr. Fox, I think his name is. We have to place it wherever he wants it unloaded.

Q. With those obstructions there that you speak of, is Mr. Herbert's house accessible from that street with teams?

A. No, sir; he can manage to get through the way the stuff is lying there; he could get through with a team, but he couldn't get over the railroad from that road, that old county or township road, that comes along the river and crosses the railroad right in front of his house there.

Q. What work has been last done, so far as your observation has gone, toward the construction of those ovens?

A. They are working on the ovens on the west side of the house now.

50 Q. How far away from the house?

A. They are building them up to within 50 feet of the house.

Q. When did you observe the men at work?

A. They were working there yesterday. They weren't just working right at the edge of the street there, but were working down further and working up that way. They commenced on the lower end like. They put on a double block and are working toward the house; then the boss told me they intended to put on another double block behind that.

Q. How close to the house with their work were the men that you saw working?

A. Well, I suppose 120 or 150 feet, maybe.

Q. And working up towards the house?

A. Yes, sir.

Q. Mr. Kuhn, what would you regard this property of the Herberts as worth if not affected by the construction of these ovens?

Counsel for defendant objects to this witness, or any other witness testifying as to values, unless prepared to show that he has knowledge of land values in that locality, and also knowledge of the improvements thereupon.

Q. Are you acquainted with the value of real estate in Sedgwick and vicinity?

A. To a certain extent, I am.

Q. What would you regard this property of the Herberts as worth?

A. Judging from other property around there in that vicinity, I would consider it worth from twenty-two to twenty-three hundred dollars.

Q. As unaffected by these coke ovens?

A. Yes, providing that there was no coke ovens there. It is as nice a location as there is around there any place.

Q. What would you regard the property as worth, if the ovens are constructed and operated as seems to be contemplated?

51 A. I wouldn't regard it as being worth anything, or very much. I know that I wouldn't live in it for my part. I wouldn't have it. I wouldn't pay the taxes on it; that is, for a residence or for any use of that kind.

Cross-examination by Mr. SHIRAS:

Q. You say you have knowledge of these streets by reason of the residences on them?

A. Yes, sir.

Q. What residences are there on Front street? What houses are there on Front street?

A. I didn't say I had knowledge of the streets on account of the residences; I said from the people living around there.

Q. The residents around there?

A. From the residents living around there in the community.

Q. I thought you said residences?

A. No; I didn't mean that.

Q. What visible evidence is there to-day that would indicate to a stranger the existence of any such streets?

A. I don't know that there would be any visible evidence at all to a stranger.

Q. Then, your knowledge of Front street and Sedgwick street has been gained by hearsay on your part?

A. From the residents that live around in there, and also, from the man that owns lots there, Mr. James Cochran, the man that these people bought lots of.

Q. He told you about these streets, did he?

A. Yes, sir.

Q. How long ago did he tell you about these streets?

A. Not over a year ago.

Q. How wide is Front street?

A. I presume it is about thirty feet wide.

Q. How do you come to that conclusion?

A. From the streets in Dawson and other towns.

Q. You calculate it is about the average width?

52 A. Yes, sir.

Q. But you don't know, as a matter of fact, whether it is twenty or fifty feet wide?

A. No, sir.

Q. Is there anything there to indicate the width of that street?

A. Not that I know of.

Q. What is the length of Front street?

A. I couldn't tell you that; I never saw the plot of the village there. I saw some of the stakes around there.

Q. You say the travel on these alleged streets was on the part of people going to the coke ovens along the street?

A. Delivering goods and so on.

Q. On the part of Mr. Rainey and his employés?

A. And other people, too; there's a good many other people living up there, who have to come down that way.

Q. They come down that way?

A. Down the county road and Front street together.

Q. Then this travel that you refer to was on the old county road?

A. And that street together. That street is used as much as the county road, if not more; that part of it just along there where the ovens are.

Q. How many houses are there on Front street?

A. There's only one house there that I know of.

Q. Was it built there before you knew anything about this alleged street?

A. Yes, sir; that house was built there before I came on the road.

Q. You know nothing about the location of that house originally, your knowledge has been acquired afterwards?

A. Yes, after I came there.

Q. Did you ever see any stakes?

A. Yes, sir, I did.

Q. Who put them down?

53 A. I can't tell you that. Mr. Cowan called me—he had a lot above Herberts there, and he went up there to hunt for the stakes, and asked me to go along up. We were waiting on some cars, or something, and I walked along up with him, and he was pointing out where the stakes ought to be on the lower side of the lot, but we couldn't find any just here; we found one or two above on the other side. That was before he sold his interest out to Rainey. He told me they were dickering for it.

Q. You know, then, of Rainey buying the property at that time?

A. I don't know just exactly the date, but I know that he bought it.

Q. Do you know of any houses he put up there since he bought the property?

A. Yes, sir.

Q. Were they built with regard to any plan?

A. I can't tell you that, for I never saw the plan of the lots.

Q. Do you know anything about any other streets, Second street for instance?

A. Only that street that runs up back of Herbert's lot there.

Q. Do you know anything about the other streets on this plan?

A. No, sir; and I supposed the way I got my information as to those streets was because of Mr. Herbert living on the corner of Front and Sedgwick streets.

Q. Then, so far as the other streets are concerned, you have no other way of knowing anything about them, and have no personal knowledge with regard to their location?

A. No, sir.

Q. You think that Front street is about 30 feet wide?

A. I presume so.

Q. That conclusion being reached from the fact that that is the ordinary width of such streets in towns in that neighborhood?

A. I come to that conclusion by the streets in Dawson borough; that's the average width of streets, 30 feet, not including the sidewalk.

54 Q. What is such property as that worth by the acre?
A. I don't know.
Q. Without improvements?
A. I don't know what that would be worth by the acre; not less than $400 *ar* $500, I presume.
Q. What sized house is this?
A. Well, I don't know the size of the house at all.
Q. How did you determine the value that you have placed upon it?
A. From other property around there.
Q. What do you value the house at?
A. Well, I don't know how to place a valuation on the house, owing to the location, and what they paid for it; and they have put a good deal on the property since that.
Q. When did they buy that?
A. They bought it about the time when I went on the railroad, and that's about ten years ago.
Q. Are you certain they bought it at that time, or whether they didn't live in it as tenants?
A. I know it was bought shortly, or about the time I came there, because Cochrans told me about it themselves.
Q. What are the improvements on this house?
A. They have remodeled the windows, and other things since I came there.
Q. Hasn't the development of this coke region had something to do with the increase in value?
A. That might be, to a certain extent.
Q. It is, then, as a residence for the employés of these coke works—that would be its principal value as a residence?
A. No, sir; I think not.
Q. Do you know what the Herberts paid for it?
A. Yes; Mr. Cochran told me they paid $1,000 for it. He told me that himself.

Hearing adjourned to meet December 4th, at 11 o'clock a. m.

55 Friday, December 4, 1891, by agreement of counsel, hearing postponed until the following day.

And now, to wit, Friday, December 5, 1891, parties met at the hour of 11 o'clock a. m.

Present: J. M. Garrison, Esq., and Hon. Edward Campbell, counsel for plaintiffs, and George Shiras 3d, Esq., and C. C. Dickey, Esq., of counsel for defendants.

C. C. Ruse, being duly affirmed, testified as follows on behalf of the plaintiffs:

Direct examination by Mr. Garrison:

Q. What is your age?
A. 53.
Q. What is your business?

A. I am in the lumber business; contracting some.
Q. Where do you live?
A. Dawson.
Q. At Dawson, in Fayette county?
A. Yes, sir.
Q. How far is that from the town of Sedgwick that the Herberts live in?
A. Well, I suppose it's about half a mile.
Q. How long have you lived there?
A. Eleven years.
Q. Are you acquainted with the property that the Herberts live in, Thomas H. Herbert and George W. Herbert?
A. Yes, sir. Not George W. Herbert——
Q. Well, where the Herberts live?
A. Yes, sir.
Q. How long have you known the property?
A. Oh, well, I have known it for, I guess, about as long as I have been about Dawson.
56 Q. How is this house and lot situated with reference to the streets in that town?
A. As far as the streets are concerned, I don't believe I know anything about it, only by——
Q. By hearsay?
A. Yes, sir.
Q. Do you know of any streets there by the house, near the house?

Objected to by counsel for defendant, as having been already answered.

Q. Do you know of any streets there near the Herbert house?
A. Well, I would call it a road, I believe; I don't know anything about the streets.
Q. Well, where is this road that you talk of, with reference to this house? Is it in front, at the rear, or on the side?
A. I believe there is a road in front and in the rear both, as I understand it. The road in front is—I don't think they are using it now, probably.
Q. How is the road in front of the house used now?
A. I think by digging or building ovens there; I think that road they are not using it; I don't know where the proper location of that road is.
Q. Well, the space in front of the house, road or whatever you call it?
A. I think that is all occupied now by the building of ovens, or something like that.
Q. Before the ovens were constructed there, you say there was a road or passage-way in front of the house?
A. Yes, sir.
Q. About how wide was that?
A. Well, I wouldn't say that.
Q. What would you say then?

A. That part of it I never paid much attention to, there is
57 a road coming across the railroad there that crosses that property, I think; the road that comes up; of course I didn't pay particular attention to it.

Q. You say you have lived there 11 years?

A. Yes, sir.

Q. Have you known that this place has been designated as a town there, during that time?

A. I have often heard of it; yes, sir.

Q. Often heard of it in the neighborhood?

A. Yes, sir.

Q. What is the name of it?

A. I don't know whether I could give that or not; I believe it was called Sedgwick; I'm not sure whether that's the name or not. I never paid much attention to it, although I have passed the house, backwards and forwards, twice a day for five years.

Q. Are you acquainted with the value of real estate in that neighborhood?

A. Well, yes; a little.

Q. Do you own property yourself?

A. Yes, sir.

Q. What would you regard this property of the Herberts as reasonably worth in the market?

A. Well, I consider that property worth $2,000, the property as a whole.

Q. If those coke ovens that are started there and in process of construction, should be constructed and operated, what would you regard the property as worth in the market?

A. I don't see how it could be worth anything for a man to live in.

Q. Well, in the market?

A. I wouldn't consider it worth—I don't see how I could consider it worth anything, only to the man who owns the ovens.

Q. In your judgment, could it be occupied as a residence, after those ovens are constructed and operated there?

A. No, sir; I wouldn't want to live there; it's pretty close.

58 Q. Now under those circumstances, what would be the damage, in your judgment, to the Herberts, if they were compelled to abandon the property on account of its being untenantable.

A. Well, if I was living in the property and had to abandon it and leave it and run the risk of getting other property, I believe I would want about $500. I would consider it worth that to run the risk; I would consider that a man that runs a risk——

Q. Then you would consider that, in addition to the value of the loss of the property?

A. Yes; because I wouldn't know where I would go. Probably I'm taking too much into that question. I would look at it that I would have to run a risk in getting another property, and somewhere that maybe wouldn't suit me. Of course if I wasn't suited there and wanted to get out, it wouldn't be so much.

Q. Have you noticed operations there recently towards the construction of those ovens, the work that is being done on the ground?

A. Well, I have noticed there was some ovens started.

Q. How recently have you noticed that?

A. Last week some day.

Q. What is the condition of the street or ground in front of this property, and near there, as you observed it last week?

A. Well, I wouldn't just say, but they were within a very few feet, it looks like it was almost against the house.

Q. What?

A. Well, I supposed they were going to build ovens, there's a little gap with ovens on both ends; there is a space in front of this property.

Q. About how wide is that space in front of this property?

A. Of course, I didn't look at it in that light. I would suppose that this gap was from 70 to 110, or 120 probably; I wouldn't say just what.

Q. Well, on each side of that gap, what work was going on?

59 A. Oven-building.

Q. Were there any men working on them when you observed them?

A. No, sir.

Q. Well, what was there; the ovens that had been constructed?

A. Yes, sir.

Q. Any iron rails there, any railroad iron?

A. I didn't notice that.

Cross-examination by Mr. SHIRAS:

Q. When you speak of this road, you refer to the road that runs between Dawson and Hickory square?

A. That's the road that comes up across the railroad?

Q. It is a country road, is it not?

A. I can't say whether it is or not. The road that comes up the railroad there, it crosses that road; it's the road that comes from Dawson; I don't know what it would be called; I suppose until before it crosses the railroad it would not be called a street; there is two roads there?

Q. You don't know the width of this road?

A. Well, an ordinary road; that's about all.

Q. You have no personal knowledge of any streets there, as streets; not as mere highways, but as streets?

A. No, sir; I don't know anything about that; only, of course, I have often heard that there was town lots laid off there.

Q. You heard that there was a town projected there at one time?

A. Sir?

Q. You mean you understood there was a town laid off there at one time, projected, or do you mean to say that you consider that there is a town there now?

A. No, sir; I didn't say that.

Q. Did you ever consider that a town?

A. I never considered anything about that part of it.

60 Q. How many houses are there on this alleged town site?

A. I don't know the extent of the town site. There is, I believe, this Herbert house and another small house, this house and an old house. Of course, there are some new building- of Mr. Rainey's, but he has built right back of there.

Q. Were these houses built there before you came to Dawson?

A. What houses?

Q. The Herbert house and this house that you speak of?

A. Yes, sir.

Q. And you don't know when they were built, except by hearsay?

A. No, I don't. The Herbert house was built there, but there has been some work done on it since that.

Q. I mean the original structure. You have no knowledge of when it was built?

A. No, sir.

Q. Is the Herbert property like other property in that neighborhood, independent of the house; I mean the land itself?

A. I don't understand what you mean by that question.

Q. Well, it is ordinary farm land, isn't it?

A. Oh, yes, sir.

Q. What does land in that neighborhood sell for per acre? Can you give us that?

A. Do you mean in lots, building lots, places to build, or in farms?

Q. I mean by the acre, whether it is laid out in lots or not, land of that character?

A. I don't know.

Q. Does it sell for $150 an acre, do you know?

A. I don't know.

Q. How much land is there in this Herbert property?

A. Well, I don't know exactly; I would suppose it was something like 70 or 80, probably 100 feet front. I never expected to come up for this kind of a thing.

Q. Not more than half an acre at most?

61 A. Well, if there is no more belongs to the property than what is fenced in, with fence around it, I don't suppose there is over half an acre; I don't know whether there would be that or not.

Q. Well, then, without any improvements upon it, are you prepared to say that this land itself, unimproved, would be worth more than $100 or $200?

A. I wouldn't like to say about that; for a piece of ground there without buildings on it; off a little piece from there, away from the ovens, it would be worth more than it would be there.

Q. I mean independent of the ovens.

A. I wouldn't like to put a price on a lot of that kind.

Q. You are in the lumber business, are you not?

A. Yes, sir.

Q. What would you consider the value of this building itself; the cost of construction?

A. Well, now, it would be kind of guess-work, I never built a building right exactly there, of course the stone-work and the brick would have to be taken into consideration.

Q. I mean a rough estimate as to what it would cost to build an ordinary frame house of that kind?

A. Well, I would say somewhere about $1,500, for a new house.

Q. A new house?

A. Yes.

Q. How old is this house?

A. I can't tell you.

Q. It's a pretty old house, isn't it?

A. I couldn't tell you.

Q. Did you furnish any lumber for it?

A. When it was built?

Q. In repairing it.

A. I did; yes, sir.

Q. What was your bill for that?

A. I couldn't tell you exactly; somewhere between three and four hundred dollars.

62 Q. Did you do any of the work in connection with the repairing of this house?

A. No, sir. I don't know but we made some frames, but nothing else that I recollect of, and I am not positive about that.

Q. The house was not of much value until you made these repairs, was it, or furnished the lumber for it?

A. Well, I couldn't say about that, they were living in it, of course, they tore off part of it, as I understand it; tore away some and replaced it again; but how the house was inside I couldn't say anything about that.

Q. The property about this house is open, is it not, on all sides, and has been?

A. Yes, sir; I believe so.

Q. And you could drive all about this property?

A. Yes, sir, I believe so; I am not positive about the rear end of the lot; I think it is open clean around.

Q. Until this suit was brought, had you heard anything recently about this alleged town?

A. Until it was brought?

Q. Yes. You speak of having heard merely, that is, by hearsay, that there was a town projected there at one time. Have you heard anything about that within the last seven or eight years?

A. Oh, yes, I have heard that talked of.

Q. That there was a town talked of?

A. That there was a town laid out there. I have heard that spoken of; I never paid much attention to it.

Q. Do you know of any recent sales of property in that neighborhood?

A. Right around there?

Q. Yes, between that and Dawson.

A. No, I believe not. Well, there was a piece of property sold on

the hill a short time ago, but I don't know anything about what it brought, and don't know anything about it.

63 Q. You have, then, no personal knowledge of land values in that locality based upon sales of property?

A. Well, not right just there; no, sir.

F. H. ROSBORO, being duly sworn, testified as follows on behalf of the plaintiffs.

Direct examination by Mr. GARRISON:

Q. Where do you live?

A. I live in Dawson.

Q. Fayette county?

A. Yes, sir.

Q. How long have you lived there?

A. A little over 8 years.

Q. What is your business?

A. I am a druggist.

Q. Do you know the town of Sedgwick in Fayette county, near Dawson?

A. Yes, sir.

Q. How do you know it?

A. Well, I have heard it spoken of frequently since I have been living in that town.

Q. Do you know the names of any of the streets in that town?

A. No; I can't say that I am acquainted with the names of the streets.

Q. Do you know the property that belong- to Thomas H. and George W. Herbert?

A. Yes, sir.

Q. How long have you known this Herbert property?

A. I have known it, I believe, ever since I have been in the town.

Q. How is it situated with reference to any highways, streets, or roads or passage-ways?

A. The house fronts on a street and I believe there is a side street comes down down the hill, and this house is situated right in the angle of the two streets.

64 Q. Then, there is a street in front of the house, between the house and the railroad?

A. That's the way I always understood it.

Q. Are you acquainted with the value of real estate in that vicinity?

A. I don't know that I am—well, I am acquainted with it; yes, sir.

Q. What would you regard this house and lot of the Herberts as reasonably worth in the market?

A. Do I understand you as they were before there were any ovens built?

Q. As unaffected by the construction of the coke ovens there.

A. I would think it would be worth from twenty-two to twenty-three hundred dollars.

Q. Have you been near the property recently?

A. I am past it every day.

Q. What is going on there, near the property at this time?

A. There are ovens being built on each side of it.

Q. Ovens for the manufacture of coke?

A. Yes, sir.

Q. Is there any work being done there at this time?

A. Well, I don't know that I can say positively just now. I noticed them working on the ovens within the last week.

Q. Men are at work on the ovens?

A. Building ovens; yes, sir.

Q. How near were the men working to this property?

A. I don't know that I can answer that definitely. I just go past on the cars.

Q. What is immediately in front of the house, on this street?

A. There is nothing.

Q. There is an opening in front?

A. Yes, sir; an opening in the ovens.

Q. Is there any obstruction, or what is the condition of the ground immediately in front of the house?

65 A. I believe it was graded off some for the ovens; I don't know of anything else.

Q. What would you regard this property as reasonably worth, if these ovens are constructed and operated as seems to be contemplated there?

A. Do you mean if built along in front of the house?

Q. Yes, and operated.

A. I don't think it would be worth anything.

Q. What would you regard the property as worth if the ovens are operated as they are now constructed on the ground?

A. I don't think there would be any difference than if they were finished in front.

Q. Could the property be occupied as a residence?

A. I meant as a residence. It might be valuable to a coke company, but it would be worth nothing as a residence.

Q. Why would it not be worth anything as a residence?

A. It would be impossible to live in the smoke and soot and dirt that come from the ovens.

Q. If, therefore, the Herberts should be compelled to abandon the property, because it would become untenantable for that purpose, what would you regard their damage, at a reasonable sum?

A. I would say the damage would be more than the real value of the property, for the reason that they lived there all their lives and have it fixed up as a home and fruit trees set out, and it is worth really more to them than the actual value of the property.

Q. Give us a figure, an estimate.

A. Well, at least $2,500.

Q. If they were compelled to go away?

A. Yes, sir.

Cross-examination by Mr. SHIRAS:

Q. You say you have known this Herbert property for about 8 years?

66 A. Yes, sir.

Q. And in that time you have never discovered the names of any of these alleged streets?

A. No, I don't know the names of the streets.

Q. When you speak of a thoroughfare in front of the house, do you mean the road that runs from Dawson to Hickory square and passes by there?

A. No; that road doesn't run directly in front of the house; it crosses the railroad a little above the house.

Q. Did it never run in front of the house?

A. I can't say.

Q. Then the thoroughfare you speak of in the rear, is this particular road?

A. No.

Q. Where is this road?

A. It crosses the railroad a little above the house. It is the county road probably.

Mr. DICKEY:

Q. You mean the county road?

A. Yes; that's what I thought you were speaking of.

Mr. SHIRAS:

Q. Then the only thoroughfare you know of in the neighborhood is the county road?

A. Yes; that's the only one, I guess.

Q. Do you know of any recent sales of property in that neighborhood?

A. I don't know that I do; no, I guess not.

Q. What is property like that of the Herberts, unimproved, in that locality worth per acre?

A. I don't know that I can give you exact figures, but I think about $1 50 a lot, a quarter-acre lot, if I remember.

Q. Do you mean to say that unimproved property of that character sells at $600 per acre?

67 A. Not probably by the acre, but by the lot; this was sold by the lot.

Q. Why does the lot add anything to the value of the acre?

A. Because a great many people aren't able to buy an acre. Lots always sell higher than the same property by the acre.

Q. Would a person pay $150 an acre for a lot, when he could get an acre for the same price?

A. Possibly not; but they probably couldn't get an acre for the same price.

Q. I understood you to say that it was worth about $150 an acre.

A. $150 a lot I said.

Q. And you don't know what the value per acre is?

A. No, sir, I don't.

Q. Do you know what it would cost to build a house like the Herberts'?

A. No, sir; I don't know what it would cost; I know the house is very comfortable; I have been in it.

Q. It is an old house, is it not?

A. I suppose you would call it an old house. I don't know just when it was built; it has been fixed up at different times; that is, it has been painted and work done on it at different times in the last few years, that I remember of. Of course, I don't know what the improvements are, but the house makes a very nice appearance and is very comfortable inside.

Q. Did you ever know of a sale in that vicinity to your personal knowledge?

A. Well, just on that side of the creek, I don't know that I have—that little run that comes down close to the property.

Q. What are the nearest sales of property that you know of?

68 A. Well, they are laying off lots within—well, I don't know what the distance is, not a quarter of a mile from there, just on the hill; and they are, at least, $150, some of them $200 for a quarter-acre lot.

Q. Then these lots that you speak of sell at from $150 to $200?

A. That's the price the parties gave me that they would sell them at.

Q. They are the same size as the Herberts lots, about, are they not?

A. I don't know exactly the size of the Herbert lot, they are quarter-acre lots.

Q. Are these lots that you speak of similar to the Herbert property in general value, unimproved?

A. Well, I should rather think the Herbert property was worth a little more.

Q. Why?

A. Well, it is down on the railroad and is more convenient to access to the town. The other is just on the raise.

Q. But not very far away?

A. No, not very far; there would be very little difference.

Q. You are not prepared to give the value of the Herbert house alone, as a structure, are you?

A. No, sir; I am not.

Q. What is there there to indicate the existence of any town? What visible evidence?

A. Well, I don't know of any visible evidence; but I have always been told that that was a town, and showed where it was laid out there years ago. That is the most that I know of it.

Q. Then your knowledge of this town is merely by rumor, or hearsay?

A. Certainly. The neighbors all speak of it; they told me about it when I went there, directly afterward, and I have heard of it frequently since; that is, as to the location of the town.

Q. Its location originally?

A. Yes, sir.

69 Hearing adjourned to meet at 1 o'clock p. m.

The hour of 1 o'clock p. m. having arrived, parties met and proceeded with the taking of the testimony on behalf of the plaintiffs in this case.

DANIEL ANSELL, being duly affirmed, testifies as follows:

Direct examination by Mr. GARRISON:

Q. Where do you live?
A. I live now in Lower Tyrone, probably a mile above Dawson, on what is known as the Jackson Mines farm.
Q. How long have you lived in that vicinity?
A. Since the fall of 1873.
Q. What is your business?
A. I am a coke-drawer by occupation.
Q. Do you know of a town in that vicinity by the name of Sedgwick?
A. Yes, sir; I know of a contemplated town, that was laid out in town lots; but it is not now a town, there being but one residence in it.
Q. Whose residence is that?
A. That is Mr. Herbert's; they own it now.
Q. When was that town of Sedgwick laid out?
A. I couldn't give you the date when it was laid out, but I suppose it was along about 1870. There was a house built on it in '73, it must have been laid out prior to that, I know there was lots sold.
Q. By whom was it laid out?
A. By what is called the Youghiougheny Oil Company.
Q. Did you ever see the plan of that town?
A. I didn't. Mr. Jones was the agent for them, and he was at my house two or three times and wanted to sell me a lot there.
Q. About when was that?
A. That was along about '73 or '74; I couldn't tell you
70 positively; I know he was at my house several times over night.
Q. He was the agent of the Youghiougheny Oil Co.?
A. Yes, sir; he was agent for them at that time.
Q. At that time, state whether or not, whether the streets were designated, and if so, how?
A. I was about buying a lot off him, and I thought the price was too high; he wanted $300 for a quarter of an acre, and I said it was too much money; he said he couldn't sell it for less; and that they had to give 60-foot streets.
Q. Could you name the streets?
A. Yes, sir; there was Front street and Sedgwick street and Second street. He took me over the ground and showed me where they were.

Q. What was there there to designate the streets, pins on the ground?

A. There was at one time.

Q. At the time he pointed them out to you?

A. Yes, sir; he showed me where the lots were; them lots where that house is built were sold, and there were two more lots sold at the upper end; and he wanted to sell me a lot in between them, and he took me over the ground and showed me where they were, and showed me where the streets were. But I thought it was a little too much money.

Q. Were the lots that you speak of staked off on the ground?

A. Them upper two lots were, and the lower two were, because the house was on them and it was already fenced then.

Q. How lately did you notice pins there on the ground?

A. It has been several years since them posts were moved from there.

Q. Do you recollect of those posts being there since 1879?

A. I couldn't tell you; I can't give you any date.

Q. State whether or not the town of Sedgwick and these streets you speak of were generally known and spoken of in the community there.

71 Objected to by counsel for defendant as generally irrelevant and as hearsay.

A. They were.

Q. Where does this house of George W. and Thomas H. Herbert stand, with reference to the two streets you have spoken of, Front street and Sedgwick street?

A. It is on what I would call the western corner.

Q. On which of these streets does the house front?

A. It fronts on Front street.

Q. State whether Front street has been used as a passage-way back and forth in front of that building, and, if so, for what length of time.

A. It has been, to a certain extent, for about five years.

Q. Was there a passage-way there in front of the house—do you recollect when the house was built there?

A. The house was built there when I first came there. I was acquainted in the first place there in '72, and the house was then partly built, but never finished.

Q. Was there a family in it then?

A. Yes; there was a man by the name of Dean built it and there was a family in it.

Q. How was the ground in front of the house there at one time used, if it was used at all?

A. Between the house and the railroad it was not used for anything in particular; it was only a mere commons between the house and the railroad; but it was intended for a street; that was left by the oil company for a street 60 feet is what Mr. Jones told me.

Counsel for defendants objects to the latter part of the answer of the witness, as incompetent, irrelevant and hearsay.

Q. You say that space there in front of the house was used as a highway or passage-way back and forth within the last five years?

A. Yes, sir.

72 Q. How does this Herbert house stand with reference to Front street? Is it immediately on the line of the street?

A. I think it is right on the line.

Q. How far did this Front street extend on either side of it?

A. The Herbert house now stands——

Q. The location of it when pointed out to you and when there were pins on the ground?

A. Why, I couldn't tell you that positively, but I suppose to the extension of the property, was the way I understood it.

Q. To what property do you refer?

A. The Youghiougheny Oil Company's.

Q. The full length of the Youghiougheny Oil Company's property?

A. Of the front of it; that's the understanding I had of it.

Q. How is that Front street now occupied?

A. Well, the biggest part of it is occupied by coke ovens, and walls, and stones and sand and one thing and another.

Q. When were you last over the ground?

A. This morning.

Q. What, if anything, is being done on the ground there at this time towards the construction of ovens?

A. Nothing, just at present, I think.

Q. When did you last see work being done there?

A. I think it was either Monday or Tuesday.

Q. Of this week?

A. Yes, sir.

Q. What was going on?

A. I saw masons working there.

Q. What were the masons doing?

A. They were building ovens and setting oven frames.

Q. How many lines of ovens are there constructed there on Front street—just one line?

A. There is just one line on the upper side of the railroad, and two lines—what I call a double block—on this side.

73 Q. Did you observe how many ovens are constructed on the upper end of the line?

A. I never counted them.

Q. How many would you judge, from the appearance?

A. I couldn't answer that.

Q. There is an opening in the line of ovens immediately in front of the Herbert house, is there?

A. Partly open.

Q. What obstructions are there?

A. There is a base wall built up against the cellar wall almost. When they build coke ovens they dig down, probably 18 or 20

inches for the base wall, and that base wall is started all along the whole line.

Q. Are there any other obstructions there in that opening?

A. Not just immediately in front; but there's a big pile of stone, mortar, sand and brick close.

Q. State whether or not that opening in front of the Herbert house is in a condition that it can be safely and conveniently used for going in or out to that property.

A. It can be, by coming down off of Sedgwick street, or Second street; they can't use Front street only to the house.

Q. It can be used, then, by coming down Sedgwick street and turning——

A. That's all the further you can come, I think, without going on the coke yard.

Q. You say you are a coke-drawer and have been engaged in that business for some time, how long?

A. About 21 years.

Q. And you are familiar with the operation of coke ovens and manufacture of coke?

A. Yes, sir.

Q. If those coke ovens are constructed and operated as seems to be intended there, what effect would it have on this Herbert property?

A. I think it would smoke it so that it would be impossible for anybody to live there, if the ovens are completed in the way they are started.

74 Q. What would be the result if the coke ovens that are now constructed should be operated?

A. Why, I don't think any family could live in there.

Q. Are you acquainted with the value of real estate in that vicinity, houses and lots?

A. I am not, any more than what I have told you; what the agent wanted for them lots.

Q. Have you some knowledge of the value of real estate in that vicinity?

A. I know what they ask for it; I don't know whether it is worth that or not.

Q. Judging from what real estate is valued at in the neighborhood there, houses, lots, etc., what would you regard this Herbert property as reasonably worth in the market, without these coke ovens there?

Objected to by counsel for defense, because the testimony of the witness shows that he has no knowledge of the value of real estate in the vicinity, and is, therefore, not competent to testify as an expert; and objected to further, because the question calls for a valuation based only upon hearsay.

A. I would regard it as worth about $2.200.

Q. What would you regard the property as worth if the ovens are constructed and operated?

A. Not anything more than the old lumber would be worth that is in it.

Q. What sized family live in the Herbert property there?

A. Why, there's the old lady and the old gentleman and a young lady and young gentleman, and they generally keep from five to six boarders there; they don't have them now, but they have had them sometimes.

Q. Thomas and George live there?

A. No; Thomas lives there.

Q. Taking into consideration the circumstances, the value of the property, the way the Herberts are situated there, and the
75 improvements that are on the property, what would you regard the damage that would result to the Herberts, if they were compelled to abandon that property on account of the construction of these coke ovens as located?

Objected to by counsel for defense, generally, as irrelevant, and specially, because the measure of damages here will be only the deprec-ation in the selling price of the property in the market.

A. That question is, regardless of the value of the property?

Q. No; I mean the loss of their property, the inconvenience of going elsewhere, pulling up stakes and securing a location somewhere else; all those circumstances taken into consideration. What would you regard the damages to be?

A. I think it would be worth about $2,700.

Cross-examination by Mr. SHIRAS:

Q. This conversation that you had with Mr. Jones was some 18 years ago?

A. Yes, sir.

Q. And at that time you believed a town was contemplated?

A. Certainly I did.

Q. And you refused to buy any lots on the solicitation of Mr. Jones?

A. Yes, sir.

Q. You have testified, I believe, also, that there is no town there now?

A. There is only that one house.

Q. Do you know when the Herberts bought the property?

A. I couldn't give you any date, but I think it is about 8 or 9 years ago.

Q. You speak of travel upon this alleged Front street as having occurred within the past five years?

A. Yes, sir.

76 Q. What was the occasion of that travel?

A. Why, it was part of the highway.

Q. Well, why was there no travel there before?

A. There was always before that, but when the B. & O. cut the siding, they took away part of the township road and they took away part of that street. The B. & O. put a siding in there, that throwed them up in the street.

Q. And this travel that you speak of was the travel that came along the highway and was diverted so as to go pass the Herbert property?

A. Yes, sir. It may be more than five years; it may be ten years.

Q. Then this travel in front of the Herbert property was very largely caused by the change in this country road?

A. Yes, sir; but that front was always an open front.

Q. A kind of a commons?

A. Yes, sir.

Q. Have you any knowledge of recent sales in that neighborhood?

A. I have, of a farm that was sold there.

Q. How far away from the Herbert property?

A. Maybe half a mile.

Q. How did it compare with the Herbert property in value, was it similar land?

A. No, I don't think it would be quite as valuable, because it is up on the hill away from the railroad.

Q. Is it laid out in town lots?

A. No, sir; I think they bought it with the intention of laying it out in town lots.

Q. What was that valued at per acre?

A. I can't tell you. I don't know what they paid for it.

Q. Then you have no knowledge of real-estate values there, except by hearsay?

A. No; I haven't.

Q. Can you state what the structure, the house itself, would be worth, independent of the land?

A. I don't think the house could be built there for less — $1,500.

77 Q. Do you know what the Herberts paid for it?

A. They rather made a trade; I can't tell you exactly what.

Q. What was the consideration for it?

A. I think they paid about $1,000, and they have done a good deal of repairing since that, it was only a mere shell when they bought it.

Q. Then, at the time the Herberts bought this house, it was of no special value, but was increased by repairs afterwards?

A. To a great extent, only as to its location.

Q. Do you know when Mr. Rainey bought his property?

A. No, sir; I don't know.

Q. Do you know whether he bought before Mr. Herbert bought his?

A. I think Mr. Herbert bought his first; I know Mr. Cochran had an interest in it; he wanted to sell me a lot after the Herberts had bought.

Q. Have you ever built a house?

A. Yes, sir; at one time; not there though, not on the river.

Q. Well, before the repairs were made on this house, what did

you value it at, when it was in that condition you speak of at the time it was bought?

A. I couldn't tell you.

Q. How did you conclude that the house is worth $1,500?

A. Because I don't think a man could build a house there like it is there for any less money. Not just the house itself, but the improvements, outside the house; there's a good orchard there of very nice fruit trees.

Q. I refer to the house itself. Are you able to answer what you consider the house itself worth at the time the Herberts bought?

A. I wouldn't like to answer that, but I suppose it was worth all they paid for it, they paid $1,000 for it.

Q. That included the ground?

A. Certainly.

78 Q. You have known this house, you say, for some 18 years. Now, give an estimate as to what you consider that house itself worth at the time the Herberts bought. You have given the value of the house at a certain figure; and now, I wish you would give your estimate as to its value before these improvements were made.

A. I think I have already done it.

Q. No; you have given what you consider it worth at the present.

A. No; I said it was worth what they paid for it, a thousand dollars.

Q. No; that included the ground. What was the house worth at the time they bought? Was it worth one-half of the value of the purchase-money, or what proportion do you say? What is your judgment?

A. I think that would make the house worth about seven or eight hundred dollars at that time, counting the lot as worth so much.

Q. What did you say the lot was worth at that time?

A. Them lots sold for $300 for a quarter of an acre; that's what Jones wanted me to pay for it, but I don't know what they paid for that lot.

Q. You think the house, then, was worth about $800 at the time they bought it?

A. I would think it was.

Q. Well, how much was the land worth then?

A. Well, I suppose that lot ought to have been worth four hundred, or probably five hundred dollars, after it was improved.

Q. I am speaking about the time they bought.

A. That's what I mean. They wanted three hundred dollars for a quarter of an acre.

Q. I am not asking you what the Youghiogheny Oil Company wanted; I am asking you what the value of the lot was, independent of the value of the house, at the time they bought it.

A. I would say $500.

79 Mr. DICKEY:

Q. Do you know of any quarter acres there being sold at $300?

A. I don't.

Mr. SHIRAS:

Q. And you say the Herberts bought the house and property for $1,000?

A. Yes, sir.

Q. Do you know how long Front street is?

A. Why, the way Mr. Jones told me, it extended through the entire tract in front.

Q. That was the intention at that time?

A. Yes, sir; there is no street there at all now.

Q. Well, is there not just as much of a street there now as there was?

A. There would be, if there was no coke ovens on the street.

Mr. DICKEY:

Q. The only difference is that the coke ovens are there now?

A. Well, yes. A coke yard makes a very nice street if it was only used for a street.

Redirect examination by Mr. GARRISON:

Q. You say that you think the Herberts purchased before Mr. Rainey purchased?

A. I know they did.

Q. Didn't he make two purchases?

A. That's the way I understood it, because Mr. Cochran owned a lot there. He purchased that lot outside of the oil company.

80 Q. And the Herberts purchased before he made this last purchase from Cochran?

A. Oh, yes; it was after Mr. Herbert bought that Mr. Cochran offered to sell to me.

Q. And he afterwards sold that to Rainey?

A. Yes, sir.

Q. And when you say that Herbert purchased before Rainey did, you have reference to this last purchase from Cochran?

A. He bought the oil company lots before he bought this lot; Rainey owned that other lot before he bought that of Cochran; he bought that afterwards; he bought that about the time he bought the Fayette coal property.

Q. And that was after the Herberts had bought?

A. Yes, sir.

Mr. SHIRAS:

Q. Then Mr. Rainey bought this property surrounding the Herbert lot before the Herberts bought?

A. Oh, no.

Q. I don't refer to the lot he bought from Cochran, but the other property?

A. Oh, no, sir. After the Herberts bought that the oil company still owned it yet.

Mr. GARRISON:

Q. Do you recollect when the Deans owned this property?

A. Why the Deans owned that along about '72 or '73, and from that on to '75.

Q. They lived there?

A. They didn't just live there, but it was under his control; he had tenants living there.

L. S. STRICKLER, sworn on behalf of plaintiffs.

Direct examination by Mr. GARRISON:

Q. What is your age?

A. 48.

81 Q. Where do you live?

A. In Dawson.

Q. How long have you lived there?

A. Just two months.

Q. Where did you live previous to that time?

A. Just adjoining the borough of Dawson, on a farm.

Q. How far away from the town of Sedgwick?

A. It's about a quarter of a mile.

Q. How long did you live on that farm before you moved to where you now reside?

A. Seven years.

Q. Prior to that time, where did you live?

A. I lived just west of Dawson, right at the lower end of the borough, in the same township.

Q. How far was that from this town of Sedgwick?

A. That is, before I moved on the farm?

Q. Yes.

A. It was a full half mile.

Q. Do you know the location of the property owned by George W. and Thomas H. Herbert?

A. Yes, sir.

Q. How long did you live at the place you lived at before you moved onto the farm?

A. Four years.

Q. Then where did you live prior to that?

A. I lived just about three miles west of that, in the same township.

Q. And how long did you live there?

A. Five years.

Q. Well, during this sixteen years were you acquainted with the lots on which this Herbert house is now located?

A. I have been more or less acquainted there since 1876.

Q. Was this house that the Herberts now live in erected at that time?

A. In 1876? Yes, sir.

Q. Do you recollect who built it?

A. I do not.

82 Q. Was it occupied?

A. It was.

Q. Do you recollect of a town site laid out there?

A. Only by hearsay.

Q. Well, from hearsay, what was the name of it?

A. Sedgwick is the name of it.

Q. Do you recollect the names of any of the streets in it?

A. I do not.

Q. About what time, as you recollect it, was the town laid out there?

Objected to by counsel for defendants, because the witness has said that he can only testify from hearsay; and all further testimony of the witness as to any alleged town site called Sedgwick is objected to, for the same reason.

Q. When you say that you had it from hearsay, I ask you to state whether it was a matter of general repute in the neighborhood that there was a town site called Sedgwick in that locality.

A. Yes, sir.

Q. Did you ever have pointed out to you any of the streets or alleys in that plan?

A. No, sir.

Q. Do you know the passage-ways, or highways, streets, and so on, as indicated on the ground, or as used as highways there?

A. Nothing more than the old township road.

Q. Where does that run, with reference to this Herbert house?

A. It runs on the south side of the house.

Q. Between the house and the railroad?

A. No, I think not. This road has been broken up by the railroad taking a part of the old township road.

Q. What was immediately in front of this Herbert house when you first knew it? How was the ground occupied or used immediately in front of this Herbert house?

83 A. Well, there was a space between this Herbert lot and the railroad and the public highway, that is, the township road; and that was vacant, I believe.

Q. Do you know whether it was used for ingress and egress to and from this property by the persons occupying it?

A. Yes, sir; it was; because that is the way I went myself.

Q. Then, after they constructed the railroad there, what effect did that have on the township road?

A. It changed the road. As I understand it, the township road now strikes the southeast corner of this town, I think, as near as I can tell.

Q. And the construction of this railroad there shifted this public road over closer to the house?

A. Yes, sir.

Q. And since that was done it has been used by the public as a highway?

A. Yes, sir.

Q. And still it has been used by the occupants of that house as a means of ingress and egress to and from their house?

A. Yes, sir. That road, I believe, has never been vacated?

Q. How is that space that you speak of in front of the Herbert house, which has been testified to here as Front street, now being occupied or used, at this present time?

A. I can't tell you, immediately in front.

Q. Well, in front, or on either side of the house?

A. On the east side is occupied by the coke ovens, and also on the west side.

Q. Leaving an open space immediately in front of the house?

A. Yes, sir.

Q. When have you last been on the ground there?

A. I have not been on the ground, I think, closer than the railroad passes, lately.

Q. Have you seen any work going on there about the ovens, in the construction of them?

84 A. No, sir.

Q. You have, as you have already stated, lived in that coke region there for a number of years, and are familiar with the operation of coke ovens and the manufacture of coke, are you?

A. I have lived about it a good while.

Q. If these coke ovens should be constructed and operated in front of the Herbert property and on either side of the property, as seems to be intended now, what effect would it have on this Herbert property?

A. I think if they put the ovens straight through there, the property would be worth nothing for a dwelling-house.

Q. What would be the effect if the ovens that are now constructed, leaving that open space in front of the house, should be operated for the manufacture of coke in the usual way—what effect would that have upon the property?

A. About the same effect as if the ovens would go through, in my judgment.

Q. Are you acquainted with the value of real estate in that community?

A. I believe I am, to some extent.

Q. You have seen the improvements that are on the property, have you?

A. Yes, sir.

Q. Describe what they are.

A. Well, it is a frame house, three-story—two-story and a basement which makes three; a nice little orchard of about, I take it, sixty or seventy trees; a well; a very desirable little property for a home for the old folks.

Q. Are you acquainted with the family?

A. I am.

Q. What would you regard that property as reasonably worth in the market, as unaffected by the construction and operation of those coke ovens, if they were not there—at a fair market value?

A. In my judgment, I thought it ought to be worth $2,500.

85 Q. Now, what would you regard the property as worth if the ovens are completed and operated?

A. I wouldn't give anything for it.

Q. Who constitutes Mr. Herbert's family there?

A. I can't tell you their names, with the exception of the father and the mother and the boys.

Q. And do you know what business they carry on there?

A. The father used to draw coke or dig coal.

Q. Well, the boys, don't they keep a kind of tavern or boarding-house there?

A. I think nothing more than a few boarders.

Q. What would you regard the damages that would result to these Herberts, if they would be compelled to abandon it—what would be the additional damage to them, besides the loss of their property?

Objected to by counsel for defendant, as irrelevant; and also, that the measure of damages here is the depreciation, if any, in the market value of the property.

A. Additional to the value that I have stated?

Q. Yes.

A. I think $200.

Mr. CAMPBELL:

Q. Have you been township assessor up there?

A. Yes, sir.

Cross-examination by Mr. SHIRAS:

Q. How long is it since you have been on the Herbert property?

A. I was there in June, 1890, taking the census, and I haven't been right on the property since, but have passed it on the railroad since that several times.

Q. In making your estimates, upon what valuation do you go—do you go upon the full valuation?

A. No, sir.

86 Q. Upon what valuation?

A. We tried to get it as near one-half the value as possible.

Q. What was assessed there for the Herbert house?

A. I can't tell you that; I don't remember.

Q. When was the last assessment made there?

A. The last assessment was made last month, I suppose. November, I think, is the time for making the assessments now. It was in 1876 that I took the assessment.

Q. You made the assessment in 1876?

A. Yes, sir.

Q. Don't the county commissioners require that the property be assessed at its full cash value?

A. It may be now, but it was not so in '76; at least they never did and never have in our county.

Q. But in your time it was supposed to represent half?

A. One-half, as near as they could get it. Sometimes the assessor would get it worth its full value, and sometimes not half.

Q. Have you any knowledge of recent sales in that locality?

A. No more than through hearsay, which came from one of the buyers himself.

Q. What do you consider land of this character, unimproved, worth in that locality?

A. Taking it into consideration that it was laid out in town lots, I should take it to be worth $150 a quarter, from the value of town lots.

Q. Have you had any experience in the erection of buildings?

A. Yes, sir, I have had a good deal.

Q. Can you tell us about what this Herbert house was worth, the structure itself, at the time they bought it?

A. No, sir, I wasn't acquainted with it at that time.

Q. Do you know when they bought it?

A. I don't.

87 Q. When you speak of the depreciation of this property by the operation of coke ovens, you have reference to it merely as a dwelling-house?

A. Yes, sir; a person couldn't live in it, I think, under the circumstances, if the ovens were fired and in full blast.

Q. What do you consider such a house as the Herberts' worth, the structure itself?

A. The naked house?

Q. Yes.

A. I don't believe they could put up a new house now like it for less than $1,500.

Q. But this house is an old structure, some 15 or 16 years old.

A. It has been testified to as to how long it has been built, but it is a pretty good house yet.

Q. But not as good as a new house?

A. No, sir; not as good as a new house, but it makes a good home yet.

Q. Do you know any of the houses that were built in the neighborhood there by Mr. Rainey?

A. I have been in them, but never noticed how they were. Of course when I took the census I had occasion to go in them, but never noticed how they were built. Sometimes these company houses are not built as firm and with as good lumber as they would be by a man building the house for his own use.

Q. How do they compare in value, for instance, with the Herbert house?

A. I can't tell you that, for I never examined them.

Q. They are recent structures, new houses?

A. Some of them.

Q. Since the other switch was put in by the railroad here, have teams been able to get along this township road that you have spoken of?

A. I don't believe they have regularly. In certain times of the year I think they can, but other times they can't. It always was a troublesome road, and, in fact, should be vacated as a township road.

88 Q. You say that it was rumored that a town site was contemplated here at one time, the building of a town?

A. It was told me that there was a town site laid out and that it was called Sedgwick. I heard of it years ago.

Q. This was some fifteen or sixteen years ago?

A. No, sir; it has only been about five years ago that I heard of this town.

Q. Is that the first you heard of it?

A. That's about the first.

DANIEL SPROAT, being duly sworn on behalf of plaintiffs, testifies as follows:

Direct examination by Mr. CAMPBELL:

Q. Where do you live?

A. I live on the Jackson mines farm.

Q. How near to Sedgwick?

A. Less than half a mile.

Q. Do you know the Herbert house?

A. Yes, sir.

Q. How long have you known it?

A. I recollect it from the time it was built, something like 17 years or maybe a little more than that ago.

Q. Do you know the town of Sedgwick?

A. I know where it was laid off and talked of.

Q. Did you ever see any of the stakes there and the alleys and streets?

A. Yes, sir; I seen stakes there at the time they surveyed it; Mr. Jones claimed they were laying off a town there.

Q. Are there any of the stakes there now?

A. No, sir; I suppose they are all rotted out long ago; they were just small stakes, something like two inches square.

Q. Do you know Front street?

A. I have seen it,—where it was staked off along the front there.

89 Q. On what street is the Herbert house?

A. It stands on what they called Front street and Sedgwick street, on the west corner.

Q. What is there on Front street now?

A. Well, there's a kind of variety of obstructions there. Coke ovens, brick, and a stone wall, and I don't know hardly what all is piled up there.

Q. How long have those coke ovens, and brick, and stone walls and other things, been on Front street?

A. They have been putting them on there for some time, probably a couple of months, maybe longer; longer, I suppose; I can't just say when they commenced.

Q. About how many coke ovens are on Front street now?

A. I don't know. I pass there every day or two, but I can't tell you quite the number.

Q. 15 or 20?

A. Yes; there are more than 15 on the upper side, and probably nearly that many on the lower side partly finished.

Q. By the upper side you mean the Herbert house?

A. Yes, sir; up the river.

Q. And by the lower side you mean on Front street below the Herbert house?

A. Yes; the west end.

Q. Is there a single or double row of ovens?

A. It is a single row on the east end and on the west end they have started a double row.

Q. How near to the Herbert house does this double row of ovens come?

A. Less than 62 feet.

Q. How near to the corner of the house does the single row come?

A. This comes within less than 42 feet to the lot at the upper end; and they have piled their dirt up on the third board of the fence.

Q. Suppose the ovens should be constructed clear across the open space, how near to the Herbert house would the ovens be?

90 A. They would come within less than a foot. Where they have their base wall started now, it would be less than a foot away from the house.

Q. Do you own any property up there?

A. No, sir; I don't.

Q. Do you know the value of property up there, in and about that place?

A. I think I do.

Q. What in your judgment, is the value of the Herbert house and lot?

A. Well, in my judgment, if I owned it, I would value it at $2,500 or more.

Q. What would you value it at, if the ovens as now built there should be fired and operated?

A. Well, I wouldn't live there, if I would get it as a gift.

Q. If the gap in front should be built up with ovens, and they should also be fired and operated in the making of coke, what would the Herbert property then be worth?

A. I would make it about the same. I would just as soon be smoked out as burned out about.

Q. Would it burn them out or smoke them out, if operated in that way?

A. They couldn't help smoke a person to death.

Q. What in your judgment, would be the injury to the Herberts,

situated as they are there, to be compelled to move away from there and establish themselves elsewhere?

A. Do you mean what injury would be to them, loss of property and moving and so on?

Q. Yes.

A. Well, I would lay that at $3,000, at the least calculation.

Counsel for defendant objects to the answer, as irrelevant.

Q. Have you been around the Herbert property there lately?

91 A. Yes; I pass there every day with a team or two.

Q. Have you seen any work going on on these ovens lately?

A. I seen masons working there this day a week. They quit work there a few days ago. I can't say just what date.

Q. What were they doing when you saw them?

A. There were masons working there, and they were stamping in dirt in the bottom of the ovens.

Q. Were they doing anything on this open space just in front of the house?

A. No, sir; they were hauling brick along there; that's about all, I didn't see them doing any stationary work.

Q. Were there any materials in front of the house?

A. Stone lying there.

Q. Suitable for coke ovens?

A. Yes, sir; building stone.

Q. You say a wall is ordinarily constructed?

A. Yes, sir; it is dug out below the level of the ground, and then built up level.

Q. Are the ovens above the house completed?

A. All but one; there is one probably about half built.

Q. Is the track laid along them?

A. I walked out there, it will be a week to-morrow afternoon, and they had the larry track laid.

Q. On top of the ovens?

A. Yes, sir.

Q. What you call the larry track is the track to charge the ovens?

A. Yes, sir.

Q. Is there any such work on the ovens below the house?

A. I can't say.

Q. When did you see the workmen at work on these ovens either above or below the house?

A. I think it was this day week.

Q. And what were they doing at that time?

A. They were packing ovens, carting dirt in, and bricklayers at work.

92 Q. Above or below?

A. Below; this side.

Q. You say there are about 15 ovens in this double block below the house?

A. I won't say exactly; there is that or more. It would be double that or more, when they are finished.

Q. Where were these workmen working on this day week, on the end next the Herbert house or the end further away?

A. I think they commenced to build the crown of ovens at the lower end and were working up.

Q. Is that string of ovens of 15 below the house on Front street?

A. Why, the front string is on what is called Front street. They cut a side track along there; I don't know how much they have taken off.

Cross-examination by Mr. SHIRAS:

Q. These pins that you speak of were there some 17 years ago?

A. Something like that; maybe more.

Q. And they have rotted out long ago, as I understand?

A. Yes, sir.

Q. Is there anything there to-day to indicate the length or width of Front street?

A. The only thing I can give you, the first lots that were sold there, that those Herberts bought in the first place—it was number 8 or 9 or something—and Mr. Rainey bought of Mr. Cochran, and they had commenced to fence it and set locust posts clear around the two lots. I ain't sure but I could find some of the butts there yet. Some of those posts stood there less than two years ago.

Q. Is there anything there to-day to indicate the length and width of Front street?

A. The understanding I always had was it was to extend from one end to the other, that is along the front.

93 Q. Is there anything there to indicate what is the width, other than the mere railroad?

A. They always used from down below the Herbert house clear up to the upper end.

Q. They drove anywhere on this commons, then, between the railroad?

A. Not as a general thing, I have done a heap of hauling around this property that the Herberts own, and we always pulled down along the fence, what is called Sedgwick street, there, and then we had to connect with the wagon road which Mr. Rainey and the railroad company done away with at their own responsibility.

Q. Then the travel to and from the property was upon this road that you say was abandoned?

A. Yes; there used to be a road that went to Dawson that connected with that street; and the railroad graded a cut around there that you pulled out onto the street, onto this property. I have pulled out on it a hundred times.

Q. Since this road has been changed, the travel has been diverted?

A. Then we had to come the other way. Within the last few months, if I pulled down to what is called the ketching part of the house, you couldn't pull down at all to the front of the house. I was there the other day and couldn't get within four feet of the fence for railroad iron.

Q. Who put the railroad iron there?

A. I couldn't tell you, I suppose it was Mr. Rainey; I didn't see him put it there.

Q. But the travel was very largely changed at the time this highway or county road was changed?

A. Sir?

Q. The travel upon this street was materially lessened at the time this highway was changed behind the house?

A. That county road was never changed, until they cut through there, and cut it up. It's a county road to-day of record. This road above was a new road altogether.

Q. After the switch was laid, that was interfered with?

94 A. It was not a switch, it was a side track. The lower road has never been done away with yet.

Q. Where was this railroad iron lying?

A. Right between Rainey's stable and Herbert's well, right up along the fence, just piled up one rail against the other, out, I suppose, 12 or 14 feet from the fence. I pulled right down and pulled my wagon against it where I tried to get into the coal-house.

Q. Was it on Front street?

A. On Sedgwick street, up along the orchard. It's lying there to-day; I walked down past it this morning.

Q. What do you consider land of this character, unimproved, worth?

A. You don't call that unimproved, do you?

Q. No; I am asking about just the bare lot.

A. Well, they sold them at $300 when they were sold.

Q. How many were sold?

A. Four, I believe.

Q. This was how many years ago?

A. Well, it was 17 years, maybe better than that, since Mr. Dean bought there.

Q. Since that time you haven't heard of any of these lots being sold as town lots on the market by any agent of the Youghiogheny Oil Company?

A. Nothing but them four lots were sold there.

Hearing adjourned to meet on Wednesday, December 9th at 11 o'clock a. m.

And now, to wit, Wednesday, December 9th, 1891, by consent of counsel, hearing continued until the following day at 9.30 o'clock a. m.

THURSDAY, *December* 10, 1891.

Parties met at the hour of 9.30 o'clock a. m., and proceeded with the taking of testimony on behalf of the plaintiffs in this case.

95 Present: J. M. Garrison, Esq., of counsel for plaintiffs, and George Shiras, 3d, Esq., of counsel for defendants.

SAMUEL M. JAMES, sworn on behalf of plaintiffs, testified as follows:

Direct examination by Mr. GARRISON:

Q. Where do you live?
A. In Connellsville, or rather, New Haven.
Q. Fayette county?
A. Yes, sir.
Q. What is your age?
A. 45.
Q. What is your business?
A. Selling real estate and surveying.
Q. How long have you been engaged in that business?
A. I have been engaged in surveying about since 1881; and in the real estate since 1871.
Q. How far do you live from the property owned by Thomas H. and George W. Herbert?
A. About four and one-half miles.
Q. Are you acquainted with the Herbert property and the locality in which it is situated?
A. Yes, sir, pass up and down the railroad every few days.
Q. Have you been on the ground there frequently about the premises?
A. I don't think I have been on the ground until I was called there to survey. I have been back of the property, but not right on the property until in July last.
Q. State whether you were employed by the Herberts to make a survey of the premises there, including this lot and the surroundings.
A. Yes, sir.
Q. When?
A. In July.
96 Q. What did you do—what was the result of your employment there? What did you do in pursuance of your employment?
A. I made a sketch of my work, which is here on file.
Q. How recently have you been on the ground and made measurements?
A. Day before yesterday.

Plan or drawing, marked "Exhibit No. 2, December 10, 1891, Lucy D. Iams, stenographer," shown witness.

Q. I ask you to state whether or not this Exhibit No. 2, to which I have called your attention, is an exact plot or representation of the Herbert property there, together with the surroundings, so far as they are shown upon that plan?
A. With the information at hand and what papers I had, it is as near as I could possibly make it, except the ovens at the lower end next to Dawson.
Q. Where there is a curve in them, do you mean?
A. Yes, sir; I may have that curve a little too much to the right

or from the river. Forgetting to take my instruments along the second time, I run that from my eye.

Q. I see you have on this plat designated Front street and Sedgwick street. I ask you to state how you ascertained the lines of those two streets.

A. I learned that from D. H. Wingrove, as one person giving information, who was with me personally.

Q. I ask you to state, also, any other means by which you located the line of Front street on the side of Front street next to the Herbert house.

A. I found the garden and I found the two Herbert lots paled in and the house right on a line with the palings, and the measurements, according to the deed, indicated the proper size and Mr. Wingrove remembered distinctly that the house was built right to the corner of the peg.

Q. Then, in addition to the information which Mr. Wingrove gave you in regard to the location of those two streets, in
97 your survey and measurements, you assumed that the Herbert house was on the corner of two streets?

A. Yes, right on the corner, Mr. Wingrove just placed his foot right on the corner.

Q. And that was the basis of your survey and measurements?

A. Yes, sir; he was going to build the house, I believe; perhaps they wanted him to build the house.

Q. Don't state what Mr. Wingrove said to you, that is not competent evidence.

A. I felt sure that Mr. Wingrove remembered distinctly where the course had been taken from.

Q. Now, then, Mr. James——

A. I also found an *an* old fence row on the south boundary line of the property, which was laid out in lots.

Q. As indicated on that plan?

A. Yes, sir.

Q. Well?

A. I found there indications of an old fence row and where the furrows had been plowed, that indicated where the fence stood; apparently a rough-and-ready fence, (what we call a rough-and-ready fence,) and by tracing up two hundred or more feet, this line just escaped a lot of forest trees. A forest grove on the left side where they are standing, and indicate where the fence had been. Then lots Nos. 1 and 2 and lots Nos. 7 and 8, if they were all of equal size, would bring the line in proper position from this indicated old boundary.

Q. State if you also had before you deeds and title papers for the land.

A. That is my recollection. I had nothing there to give me courses and distances; yes, I had the distances, but not the courses. The courses that are named on the plan are the courses that I observed, the line of the fence and the fence-row line.

Q. How did you ascertain the size and dimensions of these other lots that you have marked on the plan?

98 A. If I remember, I got them from deeds, although in the absence of the deeds now, I can't say exactly.

Q. You had before you certain deeds when you made the measurements?

A. Yes, sir, in July, but not since. It was said the plan was lost.

Q. In marking the width of Sedgwick street and Front street as 60 feet, state whether or not you ascertained upon the grounds that those streets were 60 feet in width, or whether you assumed it from information.

A. I assumed it from information, not from my own observation but I saw nothing in my own observation that contradicted the width of 60 feet. Mr. Wingrove thought he knew exactly where the lower stakes were, and so we measured the distance and it comes to the lower side track, although the side track was not there.

Q. The points that Mr. Wingrove pointed out to you where the stakes were would make Front street wider than 60 feet?

A. No, sir; would make it 60 feet, but a part of that 60 feet is absorbed now by the second side track. On the second plan I also changed that township road. We hunted the old road-bed out particularly.

Q. By this second examination, day before yesterday, you hunted out the township road, and you were able to mark that accurately on the plan?

A. Yes, sir; we found where they had graded down and where the ash bed extended down to and we located it and changed it up toward the Herbert property, some.

Q. I wish you to describe the building that is situated on the Herbert lot as nearly as you can.

A. That is immediately in the northwest corner.

Q. What kind of a building is it?

A. It has a stone basement; there are two rooms down in the stone basement, perhaps three; stone wall is 9 or 10 feet high. Then, there is a two-story building on top of that and a porch out in front, six by ten.

99 Q. Does that front porch extend out over the street, clear down to the ground?

A. Yes, sir; there are posts that have the appearance of extending over the sidewalk; there are two posts on which the porch is set so that a person can walk under it, and then, above, there is a finished porch, ceiled and floored. The porch is six by ten in width and length. There is a roof over the porch.

Q. In July, when you were there, what obstructions or buildings or works, were going on in this Front street?

A. They had it staked off immediately in front of these lots and up above the house to the southward.

Q. Where the curve is?

A. No; up here; this was north. I have made a mistake in giving the location of that house, it is on the southwest corner. From the tipple to the plan of lots as indicated on the plan, they

were grading; had graded, perhaps, a couple of hundred feet down toward the lot.

Q. Were there any ovens constructed on the ground there at that time on Front street?

A. No, sir.

Q. How many ovens are constructed there now, as indicated on that plan?

A. There are about 35; between the house and the tipple. That is, I think there are indicated on the plan, 35, but the instrument I had with me for making the ovens was a larger scale, and there may be 45 ovens there.

Q. How many ovens are on the other side of the lot on Front street?

A. There are 34 down the river, below the house towards Dawson. I know that, for I counted them.

Q. Are these ovens completed, ready for use?

A. The lower five, toward Dawson, are completed. From their appearance they are ready to fire.

Q. Is that the five next to the Herbert house?

A. The five furthest from the Herbert house.

Q. Of the double row?

100 A. Of the double row.

Q. What is the condition of the others in the double row?

A. The others are under construction; some nearly completed, and of some the bed is made up two or three feet high, and the circle staked off for the brick-work.

Q. What is immediately in front of the Herbert lots?

A. There is a foundation about four feet wide and a foot or more deep, sunk in the ground.

Q. What is that foundation made of?

A. Stone.

Q. For what purpose?

A. That is a retaining wall, as I recollect, or it is the foundation for the base wall of the structure.

Q. Of the ovens?

A. Yes.

Q. Did you observe any other obstruction immediately in front of the house?

A. Yes; immediately outside of this wall, there is stone enough there perhaps to build the ovens and complete them; stone and brick and ties, and the iron door; castings for the ovens; lime and sand, etc.

Q. What is the width of this double row of ovens?

A. 30 feet.

Q. And what is the length?

A. 240 feet.

Q. What is the distance from the Herbert house to the nearest coke oven in that double row?

A. 65 feet.

Q. What is the distance from the nearest coke oven in the single

row of ovens on the other side of the Herbert property from the line of the Herbert property.

A. 50 feet. No; that's not right.

Q. What is the distance from the nearest oven in this single row to the line of the Herbert lot?

A. 329 feet; no, I will have to add 60 feet to that, 379.

Q. You don't understand my question. I ask you to
101 state what the distance is between the nearest coke oven in the single row to the line of the Herbert lot.

A. That is just 50 feet.

Q. Looking at the plan, I see you have designated a ditch to protect the ovens from moisture. By whom was that constructed, or do you know?

A. I suppose by the same workmen.

Q. For what purpose is it there?

A. Well, catching the drainage of the ground fall.

Q. Now, just look at it and state what the width of that is, and what distance it is from the ovens.

A. The distance is 20 feet across the top, and 15 feet across the base, and the depth, at this end next where the Herbert lot is, about 7 feet, and beginning up next to the tipple that is a foot or two, and increasing on down. That is to drain the water out.

Counsel for defendant objects to all testimony with regard to the ditch, as irrelevant and in no way connected with the issues in this case; it appearing from the testimony of the witness that his plan of the said ditch is neither upon, or alleged to be upon, any of the alleged streets, but is upon the property of the defendant.

Q. I wish you to describe where the outlet to that ditch is.

A. The outlet is turned right down at the unfinished ovens, and the indications are that when the ovens are continued, the ditch will be continued.

Q. According to that where will the water empty from this ditch?

A. Empty it into the river; have it come down across this street.

Q. Across Front street?

A. It is cut through Front street now.

Q. Cut through Front street and intended to empty into the river?

102 A. Yes, sir.

Q. Did you measure from the line of Front street next to the Herbert house, the distance across to the railroad?

A. Yes, sir; from the front of the house?

Q. Yes. From the front of the house across to the railroad, what is that distance?

A. Well, I found two main tracks and two side tracks. Which shall I describe to —?

Q. The track that is nearest to the Herbert house.

A. The first rail is a few inches less than 60 feet. The 60 feet extends just beyond the first rail of the side track.

Q. Looking at the map, I ask you to state what the distance is

from the line of ovens as indicated by this foundation in front of the Herbert house to the railroad track.

A. 44 feet.

Q. How did you make these measurements?

A. I made them with a tape-line and instrument.

Q. Did you make them accurately?

A. Yes, sir.

Q. In looking at Sedgwick street, as indicated on that map here, state what there is on that street.

A. In the way of obstructions?

Q. Yes.

A. First there is a hole dug just below a spring and the dirt thrown up around, perhaps eight or twelve feet clear back, thrown up around and a kind of reservoir. Then there is two lumber piles above that, and on the side of the street—on the right-hand side, there are some T rails laying, and then comes a horse barn 90 feet long; that barn projects 35 feet out on the 60-foot street.

Q. On Sedgwick street?

A. Yes, sir.

Q. You say that you were able to locate this old public road there and have indicated it on that map. Did you have any difficulty in finding where it was?

A. Less this time than the first time. We found where they
103 had it graded along, and examining down with Mr. Wingrove's assistance, we found the road-bed where the road had been built with coal or cinders, and we identified that road-bed with that, and consequently we changed the township road as best we could from the examination.

Q. You observed the improvements on this Herbert lot, did you?

A. Yes, sir.

Q. Describe them.

A. The house has a basement, a two-room basement, stone-walled up, and three rooms on the first floor and two rooms above that; I think only two rooms above the first floor. Then there is a porch in front and it is a real clever house.

Q. What kind of repair is it in?

A. I took it to be in moderate repair; painted.

Q. Were there improvements on the lot?

A. There is a well, there is a spring here on the street, I believe, that is where they get their water, and then there is about 72 trees. In July, I counted the trees; and to the best of my recollection there is 72 trees; apples and pears, peaches, plums and apricots.

Q. You are in the real-estate business?

A. Yes, sir.

Q. I ask you to state if you are familiar with the value of real estate of this character in that community.

A. Yes, sir.

Q. What would you regard this property as reasonably worth if these coke ovens were not constructed there?

A. Well, that class of property is generally handled at about $2,500, there is more fruit on that—there is more care in the culture

of the fruit on that than on many larger ones; you won't often find a small property like that, that shows the same care in the fruit trees.

Q. What would be the effect on this property if those coke ovens are constructed and operated there in Front street?

A. Well, I don't think it would be worth anything to myself, and I don't know anybody else that would want it.

Q. Could it be occupied as a place to live?

104 A. No, sir. It would set it on fire immediately, at the first wind, I think.

Q. What would be the effect on this property if those coke ovens are operated in the manufacture of coke as they are now constructed there?

A. On this entire property?

Q. On the Herbert property.

A. I think it would kill the trees and I don't know what it could be used for, except for a coal yard.

Q. Could it be used as a dwelling?

A. Oh, no; certainly not. It is on the wrong side; if it was on the other side now. I have seen dwellings as close as the rear part of the lot would be, but it is on the windward side, and the wind blowing from west to east would go right over the property.

Q. The Youghiogheny river runs on the opposite side of the railroad from the Herbert property?

A. The McKeesport?

Q. Yes.

A. The Pittsburgh & Youghiogheny; yes, sir.

Q. How far is it away from these tracks about?

A. From this railroad?

Q. Yes.

A. Between two and three hundred feet.

Q. The railroad tracks are located right along the bank of the river?

A. Yes, sir.

Cross-examination by Mr. SHIRAS:

Q. How long have you resided in Fayette county?

A. I have resided there since I was ten years old. After I was 10 years old till I was 18; and, then, from 1881 until the present time, with the exception of one year; since 1885.

Q. Then, your knowledge as a real-estate agent of this particular property is based upon an experience acquired since 1885?

105 A. No, sir.

Q. As a real-estate agent, as to the value of this property?

A. No, sir; I have friends living in the county out there, where I lived when I was a boy. Since that I have been dealing extensively in Fayette county property. They have got to calling me Buckwheat down here for selling so much cheap buckwheat land. I have had 20 years' experience in selling real estate. I have been in the real-estate business since 1871.

Q. Prior to 1885, did you have any dealings in the sale and purchase of real estate in this particular locality?

A. We sold several farms in that neighborhood, and had scores for sale, such as the Strickler farm and the Husband farm, and a part of the Anderson farm, five acres; and a property in Dawson and in Leonardsville, right near where Mr. Hill lives, we changed property there for $2,000.

Q. When was that?

A. About three years ago.

Q. My question was what experience in the sale and purchase of property have you had in that locality prior to 1885?

A. In that particular locality?

Q. Say within a mile.

A. Without taking in the Anderson property, I have none.

Q. When was this property sold?

A. That is not sold yet, that I know of, but I had it for sale.

Q. My question was, what experience had you in the purchase and sale of property in the immediate vicinity of the Herbert property, prior to 1885?

A. I had much more than since.

Q. But I wish to have a definite answer to that question. What pieces of property have you either bought or sold within a mile of the Herbert property?

A. That is the only one, prior to that or since.

Q. And you have neither bought or sold property within a mile of that locality since that time?

106 A. No, sir; nor since.

Q. How often have you been upon this Herbert property?

A. I have never been over this property but on the two different times when I made the surveys; had passed it on the railroad, but never been on the property.

Q. Do you pretend to say that this plot or plan of yours is in any way based upon any official plot or plan alleged to have been made by the Youghiogheny River Oil Company?

A. Not from my observation of the plan. I have never seen it.

Q. Then, in the preparation of this plan you have been largely guided by the suggestions of other parties?

A. Yes, sir; and what I observed on the ground, taking them together, was the manner in which I based it—and the deeds.

Q. How do you know that this alleged Front street was supposed to be 60 feet wide?

A. I named it 60 feet because the Herberts, on my visit in July, showed me about where they thought it was, and that measured 60 feet; and then when I went back the second time Mr. Wingrove identified it, to the best of his ability, and pointed out to me where he thought the old stakes of the street were.

Q. How did you decide upon the direction of that street?

A. I took the course of the garden fence, and the house; not the garden fence; the whole Herbert property is paled in.

Q. Then, you decided upon the direction of Front street by the

line of the garden fence fronting upon the property of the Herberts?

A. That, together with where we found the old fence row, on the old boundary line at the upper end of the plan of lots, and the line of the house and the picket fence, and where they were and the posts were. Then the second time I went, Mr. Wingrove said he could remember distinctly that the house was built on the corner, right where the post was, and then he could remember how far the general plan of lots came.

107 Q. What is the frontage of the Herbert property?

A. It is a distance of eight times 54 feet 6 inches.

Q. Do you mean to say that the garden fence upon the front of this property would necessarily determine the direction of this street and the boundaries upon either side?

A. Not always; but they are some help. We find that we have to use them as helps and do the best we can under the circumstances.

Q. If this is a sixty-foot street, as you allege, have the B. & O. railroad in any way infringed upon or built upon this street?

A. They have taken with their base and slope some two or three feet, perhaps.

Q. Doesn't your map here in the case — that the tracts and the property of this railroad extend over and upon Front street some sixteen feet, opposite the residence of the Herberts?

A. Let me understand you.

Q. That the tracks and right of way of the B. & O. railroad extend over and upon Front street a distance of sixteen feet, more or less, opposite the Herbert property?

A. No, sir; that is two feet, perhaps. The first rail of the side track—as I understand there is two main tracks and two side tracks—and the nearest rail to the house encroached, perhaps, two or three inches on the sixty-foot street.

Q. Your plan shows a block of lots running from one to eight inclusive?

A. Yes, sir.

Q. How did you determine the width and the length of the lots marked three, four, five and six?

A. My recollection is that I obtained that from the deeds that I saw in July. When I went the second time the deeds were not there; they had been given over into the attorney's hands.

Q. Do you mean to say that you have seen any deeds in any way referring to lots 3, 4, 5 and 6?

A. Well, in the absence of the deeds, I can hardly say

108 about that, but I take it that I did see the numbers of the lots, of the Herbert lots.

Q. If it should prove that you are mistaken in regard to these lots referred to by me, in what way then would you have determined the length and the width of these particular lots?

A. By measurement of the lots, of the Herbert property; and by Mr. Wingrove's identity, his recollection of what he saw.

Q. Did Mr. Wingrove give you any information in regard to the width and the length of these particular lots?

A. I think he did. I don't remember that he spoke of the length, but as to the width is my recollection.

Q. Did you find any visible evidences there indicating the width and length of Front street?

A. No, sir; I found no posts, nor stone corners, nor trees in the vicinity of the Herbert property; the only thing that I can identify is the plowing along this rough-and-ready fence, plowed out on either side. It was an old fence row, and when we got up here, (indicating on plot) we found the forest trees; that would indicate that that was the property line.

Q. Would they in any way indicate the width or the length of Front street?

A. Probably it was other information given me as to the size of the lots. Then I took the course, and I found the course to be 35 degrees east.

Q. You have designated as Front street the tract of land lying between the Baltimore & Ohio railroad, and the line of these alleged lots, have you not?

A. Yes, sir.

Q. What visible evidence is there there upon this land to indicate the length and width of Sedgwick street?

A. I found nothing, except what was pointed out to me as the probable corner of the street above, and the street below and the probable width.

Q. Upon what did you base your width of Second street?

109 A. From the instructions; not that I found anything on the ground; it is cleared ground; Mr. Wingrove specially could remember where he used to see the stakes.

Q. Then you have taken the representations of Mr. Wingrove very largely as a basis upon which you made this plan of lots?

A. Yes, sir.

Q. You have no personal knowledge either of the laying out of this town, or have you found any visible evidence there?

A. I found no visible evidence.

Q. That would indicate the laying out of such a town?

A. I have heard the name of the town; but I have no visible evidence, other than corroborative evidence, that is, the house and the garden fence corroborating that which they told me; outside of that I have none.

Q. Then, you don't know, as a matter of fact, whether these streets might not have been either 30, 50 or 60 feet in width?

A. Well, no, sir.

Q. Will you please state how near those ovens are that are apparently ready for operation to the Herbert house.

A. That are now ready?

Q. That you have testified are now ready for firing in the double row?

A. Well, they are 65 feet.

Q. I think you misunderstand me. How close are they to the residence?

A. These that are ready to fire, or those under construction?

Q. Those that are apparently ready for firing.

A. These five here at this end? They are likely about 265 feet.

Q. Have you had any experience in the operation of coke ovens?

A. No, sir; only as I have seen on passing trains.

Q. Then, of this double row of coke ovens that appear upon the plan, you believe that some five are ready for operation?

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A. Yes; from all appearances they are entirely finished; I didn't look down in the ovens.

Q. Is there any railroad track upon the top of these ovens?

A. Oh, no; of course, you have to have a railroad track; they might still fire them; but the rails aren't laid across.

Q. Do you know whether it is customary, or not, to operate a small number of ovens in a row of that kind before the row is completed?

A. I don't think it would be.

Q. How close is the nearest oven in the single row upon the opposite side, to the Herbert residence—not to the property, but to the Herbert residence?

A. About 127 feet. The house is 22 feet front.

Q. You have already stated that you have neither bought nor sold property within a mile of the Herbert lots. Have you any personal knowledge of any such sales within that distance?

A. I believe I sold some property in Dawson.

Q. Have you any personal knowledge of any such sales within a mile, not for which you have been an agent?

A. I don't believe I have.

Q. What is ordinary farm property of this character valued at per acre, in or near that locality?

A. Well, the way land is selling, farm land generally, one or two miles back from the railroad——

Q. Around in that locality, what would you say it would be worth?

A. Within a mile of there?

Q. What would you say that land per acre is worth in that immediate vicinity?

A. What would you call the immediate vicinity? Within a mile or half a mile?

Q. Along the track in the immediate vicinity of the Herbert property.

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A. I don't know. I know what lots are selling for around in our town and in New Haven and Connellsville and Broadford.

Q. I object to that answer. I would like to have you answer the question I put. If you are not able to answer it just say so.

A. From one to two hundred dollars an acre as farming land, and not with a view of laying it out in lots; that is, similar land to that.

Q. What fraction of an acre is the Herbert property, in a rough way?

A. About half an acre.

Q. Outside of the mere fruit trees, what is there upon the property—what is there in the land that would make it more valuable than other farming land of that character?

A. Well, there are small buildings outside, a stable and so on.

Q. No; I refer to the land itself.

A. Well, its closeness to the town of Dawson and the site itself as a town; the location it is on; Dawson and that being so nearly one in distance.

Q. Are there coke ovens in operation in the immediate vicinity of that property, not shown on the map there?

A. Other plants than this you mean?

Q. Mr. Rainey's plant?

A. This here, (indicating) on this side of the river. I didn't go over there——

Q. Did you observe a coking plant in operation in the immediate vicinity?

A. I don't think that I saw any. There is, away up the railroad.

Q. How far?

A. It's away around some of the bends; I don't know how far.

Q. Do you mean to say that there are not ovens within 1,500 feet of this property in operation?

112 A. Unless I would take another observation, I can't answer that; but I don't think they are in sight that close.

Q. But assuming that there are ovens within 1,500 feet of this property and in operation, would that decrease or enhance the value of this property?

A. They are away around from this.

Q. But, assuming that they are within 1,500 feet?

A. It's according to their location; if they are on the windward side, of course it would decrease the value.

Q. Then when you say if they are on the windward side, that would depend on the direction of the wind?

A. If they are on the west side of the property.

Q. Does the presence of this railroad line, containing four or more tracks, and within 60 feet of the front of the Herberts' residence, increase or decrease the value?

A. The additional two tracks, the additional side tracks do you mean?

Q. What I mean is, whether that railroad track, within 60 feet, instead of being further away, increases or decreases the value of this property?

A. I might say that the two private coal and coking side tracks decrease it.

Q. Are you prepared to say that this small tract of land, containing a house built some 17 years ago, considering its proximity to the railroad track and to the coking plant already in operation, is worth in the market to-day $2,500?

A. I think I would be prepared to say that there is no other

coking plant in sight, and there is no smoke can reach it, that is visible.

Q. That is not an answer to my question.

A. I don't think there is any coking interferes with it.

Mr. GARRISON: Answer the question.

A. If there are, well, then, of course——

113 At request of counsel for defendant, the commissioner repeats the question.

A. Now, when you speak of coking plants, do you mean the Rainey plant?

Mr. SHIRAS:

Q. I don't mean the plant shown on that plan. I mean assuming that there are such ovens in the immediate vicinity and operation within 1,500 feet.

A. I don't think those ovens away around there would have anything to do with disminishing the value, particularly. The only thing is, it brings in a different class of people; it brings in an inferior class of people.

Q. Would not that affect the value of property?

A. To a certain extent, it does.

Q. Now, if this plant was within a thousand feet, then the depreciation would be more apparent?

A. It would be more injurious?

Q. Yes.

A. Yes, sir; the closer they come with the plant.

Q. Have you examined this ground carefully?

A. I looked through it the other evening, through the main part of the house.

Q. Is there any entrance to this house upon Front street, except by way of the cellar?

A. No, sir.

Q. Were you able to determine what the usual and customary means of ingress and egress to this house is?

A. I took it that they went in from the cellar or basement, and went up the stairway.

Q. Didn't you observe an entrance upon the west side of the house?

A. It is an "L" house, and right on the east side there is an entrance, yes; there is a hall runs back through, and I think the hall comes out into the back yard.

114 Q. Have you had any experience in the building of houses?

A. No, sir; nothing than just hearing people talk about what it cost.

Q. What would lots of this character sell for, considering this particular locality itself, the alleged streets being neither paved nor graded, and considering the proximity of the railroad and of these coking plants not shown upon the map—what would you consider these lots worth?

A. Lots generally in that vicinity and those little towns are selling from one to four hundred dollars.

Q. That's a very wide margin. My question is, not what they are selling for in those particular towns, but what these particular lots, in what could only be a projected town, are worth.

A. They may be worth two or three hundred dollars.

Q. How many rooms are there in this house?

A. There are two in the basement, and three on the first floor and two, I believe, above.

Q. What kind of a structure is it?

A. Frame; painted; and a porch in front.

Q. Considering that the house has been built some 17 years, what would you consider it worth, independent of the property itself?

A. I don't know that; I don't know anything that would depreciate its value, particularly; from the general appearance, it appeared to be a pretty good house.

Q. Are you prepared to say that that house couldn't be built for $800.

A. I don't think it could. Oh, my no! There is a good stone foundation built up 8 or 10 feet high.

Q. But this house is not as good as a new house?

A. Oh, no, not as good as a brand new house.

Q. As a frame house, it would deteriorate materially in that number of years?

A. Yes; certainly.

Q. Do you know what the Herberts paid for this house and lot?

115 A. I don't.

Q. You made no effort to compute the amount of lumber and other material in this house, upon which to base an estimated value of the house itself?

A. No, sir; I just took the seven rooms——

Q. Is this basement that you referred to used for any other purpose?

A. I don't know what it is used for.

Q. Then you don't know that it differs from any ordinary cellar in the method of use?

A. Yes; it is up high and dry and could be made dry.

Q. But you don't know to what use it is put, whether for living in or cooking?

A. No, sir; I don't, I only know that its dimensions would admit of it.

Q. Are there any windows in it?

A. I think there are.

Q. But you are not positive?

A. I am quite sure there are windows in front, but I think not on the side. There might be on the side; I don't know.

Q. Upon this plan you have designated there a tipple and have the same built and erected on Front street. Are you sure that it is correct?

A. We measured up to the tipple; the tipple itself and the loca-

tion of the engine-house and the anchor and the pit mouth, across here (indicating on plan) is a sketching from a general view—from here up. The probable continuance, we didn't measure down.

Q. Then the continuation of Front street to the lot designated as No. 8 was not made by running tape and measure?

A. Yes, sir; I say we run right on through.

Q. Then, in locating this tipple, how did you determine its location?

A. Just from a bird's-eye view, just sketching.

116 Q. Are you prepared to say that it is upon this alleged street and within a few feet of the railroad track?

A. I don't understand the street to go beyond here (indicating on plan). I can't say whether *that* it is a little up or a little down. I traced that just by sketching, and it might be a few feet one way or the other.

Q. Might it not be off and behind the front line of this single row of ovens?

A. I don't think it would be twenty feet either up or down—nearer to or farther from the river, I mean.

Q. Did you notice in what direction the dip was in this ditch you speak of?

A. Yes, sir; right towards the Herbert property?

Q. Did you measure that ditch the entire length, to see whether that is true of the ditch as a whole?

A. Back here (indicating) it runs less.

Q. Did you observe a ditch at right angles, at the rear end of this single line of ovens, for the purpose of draining the ditch?

A. No, I didn't notice anything. I think there would have to be a culvert under those ovens, if those ovens are continued; there may have been an outlet there, but I didn't see any.

Q. Are you prepared to say that this ditch as a whole would not drain to the eastward?

A. The way it is now, the water is running right out there. (Indicating.)

Q. I am referring to the ditch as a whole.

A. I don't think it will. I didn't take any measurements; the first time it wasn't there, and the second time I had no instruments. If I remember right, I saw the water running down there (indicating); it was running out.

Q. You are not prepared to say, then, that Mr. Rainey's intentions are not to drain the ditch to the eastward?

A. I am sure of that. I am sure the drain comes this way (indicating). He might lower it eastward and take the water that

117 way; but the way it is now, the indications are the only way to do is to make a deep cut there and a small cut there (indicating on the plan).

Q. Have you observed a ditch at the extreme eastward end?

A. I didn't see any. It is apparently dried up here, where it ain't strictly level, it is laying, and when you get down here (indicating on plan) there is quite a puddle.

Q. That is, in some places in the ditch there is no flow to the water; it is stagnant?

A. Yes, sir; at this end, where it harbors the water, there may be water standing around there for thirty feet.

Q. Would that not indicate to you, as a surveyor, that the ditch is not completed, if the water stands stagnant?

A. It might indicate that; but it is seven feet here, and in order to take it out they would have to take it underneath.

Q. And you say there was no opening in the end to take the water off?

A. I couldn't see any.

Q. Are you prepared to say there is no such ditch or opening there?

A. I took it for granted there was none. Every indication was the ground pitched the other way.

Q. But you used no levels to determine that?

A. The water was level enough for me. The water is a level; when we have a straight level, we go by the water level.

Q. And you observed water lying stagnant there?

A. Yes, sir; in this end, but none in the other; now to take the same depth back here (indicating) it might be nearly level; but it is took on a slope, down this way, and there (indicating) is the water. If a spirit level was put on—but lowering this way, it has the appearance to the eye of being decidedly a dip this way; then to drop that end as low as this end——

Q. But there is now a uniform declination. How do you account for the water?

118 A. It seems to dip that way. The ground is very dry at the present time; many wells over the country are not supplying water at all; this ground is very dry, and there is nothing there to indicate that there is any water at all; and from the little freshet, you know, why the freshet accumulation has been down here; and there is water seeping out of that place here, showing that the drainage is here; not only standing, but running out.

Q. Then, in conclusion, Mr. James, you may state whether you noticed, on your two visits to that property, any visible indication or evidence of the existence of a town with streets, roads, or highways.

A. Nothing except corroborative.

Q. You discovered no visible evidence of itself?

A. No, sir; except the corner of the house and the fence, and this old fence row, where it was plowed.

Redirect examination by Mr. GARRISON:

Q. Looking at that plan again, the old line fence that you refer to is the outer line of lot No. 8, as marked on that plan?

A. Yes, sir; I have written the words "old boundary line."

Q. You spoke of a railroad siding in front of the Herbert residence, and that slopes part of it, at least, is inside of the sixty-foot line as you give it.

A. Yes, sir.

Q. Do you know who put that siding there?

A. No, sir.

Q. In your testimony on cross-examination, you say that you didn't understand the street beyond "here"—indicating a point on the plan. Now, I wish you to state what point you have reference to when you say "here," indicating on the plan?

A. The line of the forest trees and the old fence row—the property line of the parties that laid out the town site.

Q. And the outer boundary line of lot No. 8?

119 A. Yes, sir.

Q. Was this ditch that you speak of there in July, when you were first on the ground?

A. No, sir; it was plowed and tore up; they were plowing and tearing up the ground then; not quite so far down, though.

Q. How long have you known, by common repute, of a town in the neighborhood by the name of Sedgwick.

Objected to by counsel for defendant, as leading, and as assuming that the witness is prepared to say that it is so known by common repute.

Q. By common repute in the neighborhood, I ask you to state whether this town has been known there and spoken of generally in the community.

Objected to by defendant's counsel, for same reasons as above; plaintiff's counsel having assumed that it is known by common repute.

A. I have heard it frequently and some years ago, but at what time I could scarcely now recall—when I first heard it; I have heard it frequently, though.

Recross-examination by Mr. SHIRAS:

Q. Did you find this alleged line fence that you speak of along the easterly line of lot No. 8?

A. According to information it was——

Q. I ask you to answer the question.

A. I found it in a line with the old forest trees.

Q. Then you found no line fence extending along the line of lot No. 8?

A. Well, information locates lot No. 8 for me—Mr. Wingrove and I found that right on the line.

Q. You will please answer my question upon this point.

120 Did you find along the line of lot No. 8 anything to indicate the existence of this line fence?

A. Yes, sir; I found that the ground had been plowed and thrown, and had every appearance of a line fence. A person can tell a line fence that way very positively.

Q. Then you assumed that because of a plowed ditch or line there that that must have been a line fence?

A. Yes, sir; I took it for granted that that was the fence.
Q. Who constructed this line fence that you speak of?
A. I can't say.
Q. Why do you speak of it as a line fence?
A. I say there are indications of a fence having been there.
Q. And because you found a fence in that particular locality, you assumed that it was a line fence, did you?
A. Yes; for two reasons: That it was in keeping with the forest timber above—the line of chipping on the forest timber above—and the measurements to the lots as represented. The number of different lots as represented would measure out to that; first starting with the house, this house would be right on the corner.
Q. How did you determine the length and width of each of those lots?
A. I take it I got it from the deed.
Q. And if there are no such deeds in existence for all of those lots, in what way would you account for the figures given?
A. From information from Mr. Wingrove and from Mr. Herbert. There is nothing more on the ground than what I have said; but the indications on the ground will carry it out.

Hearing took a recess till one o'clock p. m.

DAVID H. WINGROVE, recalled, on behalf of plaintiffs.

121 Direct examination by Mr. GARRISON:

Q. You have already testified that you know when this Herbert house was built?
A. I have; yes.
Q. And you have already testified that you saw the stakes there on the ground, indicating where Front street was?
A. Yes, sir; I have.
Q. I ask you now to state if you know as a fact, from your own observation, that this Herbert house was built immediately on the corner of Front street and Sedgwick street?
A. I do.
Q. Mr. Wingrove, I ask you to look at this plan (Exhibit No. 2), and state how far Front street, as you recollect it, extended up the river?
A. It extended 329 feet above the Herbert property here, according to measurements. Those lots were calculated to be 54 ft. 6 inches, but when we measured it, it run a little over that, but we might have varied, maybe; it would be 327 feet, according to the measurement, over those lots.
Q. Now, where is the line of the oil company's property on which those lots were laid out?
A. Right up here (indicating on plan).
Q. Were the lots laid out up to the line of the oil company's property?
A. They were.
Q. What is there at this time to indicate the line?

A. As this man says, there is the ridges and the forest timber cut off—the ridges of the plowed line, there was a fence there at the time this was laid out, but it is not there now.

Q. You saw that fence?

A. Yes, sir; I saw that fence.

Q. I ask you to state if you were with Mr. James day before yesterday, when he was on these grounds making measurements?

A. I was there.

122 Q. In making those measurements, where did he begin, with reference to the Herbert house?

A. Commenced on this corner here.

Q. On the corner of Sedgwick and Front streets, right at the corner of the house?

A. Yes, sir.

Q. Then you measured in what direction?

A. We measured this street here; and we measured from the house to the wall, and we measured from the wall over to this here siding that Mr. Rainey put in there that is cut off of the street.

Q. Did you measure from that same corner of the house clear over to the corner of lot No. 8?

A. No, sir; we didn't. We commenced as near as we thought here at the line, and we measured down; but we measured from the corner of the lot up here to this first oven.

Q. Did you and Mr. James make a measurement from the outer line of lot No. 8 over to the line of lot No. 2, belonging to the Herberts?

A. We did.

Q. Do you recollect what distance you made that by your measurement?

A. We made that 329 feet.

Q. And that brought you out to this old line fence that you speak of?

A. Yes, sir.

Q. Now, was this Front street, as you recollect it, and from the pins on the ground that you spoke of in your other testimony, a straight street, continuously through, or did it change its course any place on Front street?

A. According to my recollection, it was a straight street clear through—well, it curved a little; it run with the railroad.

Q. It made a curve, then, to correspond with the railroad?

A. Yes; that was my understanding of it when I seen a plot of the town.

123 Q. Now, you saw this double row of coke ovens that are located there, you say yesterday?

A. Not yesterday; day before.

Q. I ask you to state whether Front street, as you recollect, extended beyond where the far end of Rainey's coke ovens now are?

A. I don't think it extended down only to the branch railroad; there was a branch railroad took up Pigeon run, and these coke ovens are right around there to suit that branch railroad; and I can't say that they extended quite so far.

Q. But the main part of the ovens are within the limit of Front street?

A. Yes; that is, they are laid out there, and not built yet, right on there.

Mr. SHIRAS:

Q. Do you mean the front row or the second row?

A. I mean the front row.

Mr. GARRISON:

Q. There may be some, then, at the far end of the double line of ovens that are not on the street, but the most of them are on the street?

A. The majority of them are on the street.

Q. Have you noticed these coke ovens as the work on them has progressed?

A. Not in particular; of course I have seen men working there all along, but no particular date, or anything of that kind, but I have seen men working there all summer, up to within a week or two—there has been no men working; there has been men working up here firing those ovens, but not building.

Q. You mean there has been fire in the single line of ovens?

124 A. Yes, there has been fire put in there for two weeks.

Q. What was that fire put in for?

A. To heat them; of course this time of year if they let them freeze, they would fall down.

Q. You saw this ditch on the north side of this near line of coke ovens, did you?

A. On the northeast side, I did.

Q. In what direction does the water flow in that ditch, in the direction of the Herbert house, or the other direction?

A. At the end next the Herbert house there is a puddle, and water standing; along about the middle of it it is dry, and I suppose, probably, it flows southeast from the middle of that ditch, probably; because there is no water there, and I suppose it runs off the other way, on to Mr. Rainey's property.

Q. State if there is an outlet for that ditch on the lot adjoining the Herbert lot.

A. There is no property joining it; it is probably 100 yards away from it; it is here—flows where the town was laid out—probably it is hundred yards.

Q. It is a hundred yards from the outer line of lot No. 8?

A. Oh, no; it's away up here (indicating).

Q. No, no. I am asking you if there is an outlet on the lot adjoining this lot of the Herberts?

A. I didn't see any outlet there; the water stood there; but here, from here up, there was an outlet up here.

Q. I ask you to look at that plot particularly and state if that indicates the general location of those streets, and the condition of the ground, as you recollect?

A. Well, yes; it does.

Q. You and Mr. James together made an examination to see where the location of this township road was, did you or did you not?

A. Yes, sir; we did.

Q. Did you have any difficulty in finding where it was?

A. Not a particle, because I have been there long enough to know where it was.

125 Q. Now, look at this plan, and see whether those marks there indicating the township road are correct, as they appear upon the ground.

A. Well, now, here is the township road; it comes up not immediately in front of the house, but about here; it crosses the railroad a little more than half way toward the house, and it runs across the railroad and down along the river below the railroad.

Q. Well, is it correctly indicated there on that, as you recollect it on the plan?

A. That is very near correct, yes, sir; it looks to me as if that county road, or township road, or whatever it might be, crossed right up here and run along the railroad. It run there ever since I knew the place, for thirty-one years.

Q. Did you count the number of ovens that are constructed there?

A. No; I didn't count them; I would suppose there is nineteen or twenty.

Q. I want you to explain more particularly what you have said in regard to the outlets to that ditch.

Counsel for defendant objects to any further questions on that matter, as the witness has stated that he found but one ditch, and that at one end of the line of coke ovens.

Q. If that is not correct, I want you to correct it and state just how it is.

A. The ditch is there to let the water out, but the water stands here; this ditch is not level enough to let the water out; it stands there six inches deep.

Q. But that ditch that is there is for the purpose of letting it out, is it?

A. I would suppose that it is.

Cross-examination by Mr. SHIRAS:

Q. You have testified that you know when this house
126 was built. Will you repeat the date of the construction of that house?

A. Well, I did testify that it was laid out there in 1872 or 1873; I can't name the day of the month it was laid out there, of course, but I know when the house was built; it was built about in '73; it may be a year later or it may be a year sooner.

Q. You are not prepared to say, then, within a year when it was built?

A. Well, I will say it was not a year from '73.

Q. You have testified that you know as a matter of fact that this house was built on the corner of Sedgwick and Front streets. How do you know that?

A. Because I know from the plan; the agent showed me the lot and the stakes were standing there when the foundation was dug. That's the reason I know it.

Q. How long ago was it that the plan was shown you?

A. I tell you it was probably in 1873; maybe a year later or a year younger; but I think it was not later than 1873.

Q. Then, when that plan was shown you, was that house constructed, or partly constructed?

A. Only partly; the calculations were made exact to put that house on the corner.

Q. When did Mr. Jones show you this plan?

A. Just when the deed to Mrs. Dean (Mr. Dean done the business but the deed was for Mrs. Dean) was being made out—or the deed wasn't being made out, but the article of agreement.

Q. Have you seen this plan in the last eighteen years?

A. I have not seen the plan since Wm. Jones was selling that lot to Andy Dean.

Q. And that was about the year 1872?

A. Yes, about; it might have been a year before or a year later; but not more than that.

Q. How is it that after this long lapse of time you are able to state the number of streets shown, their width and length, and the width and length of these lots?

127 A. Well, I have resided right there and know the distance; I have never been a mile away from that place since.

Q. What I ask you is, what is there, since that time the plan was shown you, to keep within your memory an accurate description of these streets, their length and width, and the length and width of these particular lots?

A. There is nothing, any more than seeing them every day, or nearly so.

Q. Well, seeing it every day, what is there there to indicate the width and length of these streets and the width and length of these several lots?

A. There is nothing to indicate, but I knew it at the time, and I don't forget things every day; there is nothing there to show them to-day, if I understand you right.

Q. Then your impressions here are based upon the impressions you obtained at the time this plan was shown you in 1873?

A. Yes, sir.

Q. Mr. James has testified that he has made this plot partly from deeds and partly from statements made by you, and in reply to the question as to how he calculated the width and the length of lots Nos. 3, 4, 5 and 6, he stated that he thought they were prepared from the deeds. Now, I would ask you whether, as a matter of fact, you and Mr. James did base those calculations as to the sizes and lengths of these lots upon any such records?

A. I don't know as there was ever any deed made out from the

oil company for 3, 4, and 5, but there was for 7 and 8; but the distance was the same from one street to the other, and of course we made our calculations; if this lot was 54½ feet, why this one in the middle would be the same.

Q. Then, as I understand you, you assumed that the length and the width of these lots must necessarily agree with the width and depth of the Herbert property?

A. Certainly.

Q. And when you give that here as 54 feet and 6 inches in width and 200 feet in depth, you arrive at your estimate in that way, namely——

128 A. I never measured them in depth.

Q. Then how do you know that they are 200 feet?

A. Well, we assumed the streets were parallel with one another—we knew according to the plan they were; and if one lot was 54 ft. 6 in., the other one would have to be.

Q. You assumed, then, that these streets are parallel?

A. Yes, sir.

Q. And that the lots that were not sold were of the same width as those sold?

A. Yes, sir.

Q. Are you prepared to say that these streets were parallel?

A. Yes, sir, I am.

Q. What would fix that in your mind?

A. The plot of the town.

Q. You don't mean to testify that you recollect sufficiently to swear that these streets were parallel—but that to the best of your recollection as to that, such was the case?

A. Of course I can't recollect exactly to a foot or six inches, or anything of that kind; but the idea was in my mind that it was so.

Q. How do you fix upon Second street by name?

A. Why the stakes were there when this house was built.

Q. Did the stakes have the name upon them?

A. They didn't.

Q. How did you know that that was intended to be called Second street?

A. From the plot of the town, sir.

Q. Your recollection, then, of this plan which was shown you some seventeen years ago so distinguished this street by name?

A. Yes, sir; it did.

Q. How did you fix the width of that street?

A. Well, I can't any more than just have the mere form of an idea about the width of that street, because it has been seventeen years ago, but I think it was about fifty feet. That is, Second street I mean.

129 Q. Well, now, if it was your recollection that this street was a fifty-foot street, how do you account for its being marked as a sixty-foot street?

A. Well, I can't account for it at all. It might have been 50 or it might have been 60, or it might only have been 40, but I think

to the best of my recollection, it was about a fifty-foot street. If you were there I could show you where the street was.

Q. You have testified that Front street extends east to what is marked on the plan as the "west line of lot No. 8," have you not?

A. No, sir; the east line of lot No. 8.

Q. Yes, excuse me—the east line. What is there upon this east line of lot No. 8 to indicate that there was the line between the properties?

A. There is nothing there but some of Mr. Rainey's coke ovens now.

Q. When was there anything there to indicate that?

A. There was a public road there, until he dug it up.

Q. I think you are mistaken. The true line of lot No. 8.

A. There was a fence there, belonging to this company; there was a fence run down and stopped there below the road; didn't extend down on this property.

Q. Then, because you know or believe, that there was such a fence there upon the west side of the Fayette property——

A. The northwest, yes sir.

Q. You assume that that is the eastern limit of this town site?

A. I know so. It was a farm there where the eastern side was. And there was a fence there when it was a farm.

Q. What is your recollection in regard to the width of Sedgwick street?

A. My recollection of that was, I thought it was 50 feet, but when we measured it, according to the way the stakes were set, it must have been a 60-foot street.

Q. What stakes do you refer to now?

130 A. I refer to the stakes that were set there some 17 or 18 years ago. I know by a tree that stood there where the stakes set from this fence, and I think it must have been a 60-foot street.

Q. You say your impression was that it was a 50-foot street, and then you believe that a certain tree stands about where the stakes were, and that would make it a 60-foot street?

A. Yes, sir; the tree is standing there yet.

Q. You have assumed, from the best of your recollection, that this Herbert house was built immediately upon the corner of Sedgwick and Front streets?

A. I know it was; because I was there when it was laid out.

Q. Did you make any measurements at that time?

A. But there were the stakes at that time plainly laid out for to build by.

Q. And then, when you made your measurement along the front of these lots on Front street, you began there as the starting point?

A. Of course I did.

Q. You have testified that Front street is not exactly a straight street, that it curves some?

A. I see below the Herbert house that there is a curve, below; that is, northwest, above the Herbert house.

Q. Well, do these particular lots, as shown there upon the plan,

indicate that that street is a curved street? What, haven't you run a straight line in front of the lots?

A. We run a straight line from there up (indicating).

Q. What makes you think this was a curved street?

A. Nothing more than the plan of the town which I saw.

Q. Haven't you testified that the railroad curves there some?

A. Of course I did.

Q. And have you not concluded, from the fact that the railroad curves there, that the street must necessarily curve?

A. No, sir; I saw the plan of the town.

131 Q. And you even remember the fact that there was a slight curve on this street?

A. Yes, sir; I think there was a curve right there below Sedgwick street; that is, next to us now, down the river.

Q. Mr. James has testified that some four or five ovens beyond the western end of the double row, as shown upon the plan there, are apparently completed. Did you examine those ovens?

A. I was there; yes, sir.

Q. Those ovens are not, from your testimony, (the rear ovens) upon Front street?

A. No, they are not on the street, I think; they don't look to me as if they were.

Q. Are any of the ovens upon the inner row upon Front street, as you recollect it?

A. There is no ovens completed.

Q. Well, as projected?

A. Yes; there are some of them projected that will extend——

Q. The second row, I refer to.

A. Now, let me explain to you that some of those ovens stand out on the street here.

Q. You think some of the ovens in the double row?

A. Yes, sir.

Q. You are not prepared to say how many?

A. No, I ain't.

Q. Are any of those upon what you think to be Front street, completed?

A. No; I don't think they are completed yet, but the frames are standing there; of course, the wall might be out there and not them.

Q. You say that you observed a ditch connecting with the larger ditch as shown on the plan, for the purpose of draining the water off, and if this ditch would flow it would carry the water through a break in the ovens at the easterly end of this single row?

A. I observed when we walked up there—this thing was

132 cut clear behind the ovens—I observed that at this upper end there is a break in the ovens there, and I observed that this point was dry, but this point (indicating) was not.

Q. Is that ditch built upon the property of Mr. Rainey?

A. I suppose it is.

Q. Well, don't you know that it is, if that plan is correct?

A. Yes; I know it is.

Q. The firing of those ovens that you speak of in the single row was for the purpose of preventing their disintegration, for the purpose of drying them?

A. I don't know what the firing of those ovens was for, but still I know they had to be, or else they would have fallen down; that is, according to my experience; but I suppose they intend to bake coke in them; that is only a supposition, though, I don't know that to be true.

Q. Then, from your knowledge of this locality you are not prepared to say that to-day there is anything to indicate, in a visible way, the length and width of these streets, or the length and width of these lots generally?

A. There is nothing there to show it to-day, any more than this Herbert property and this here old line ridge there, that Mr. James stated; and there is the forest, the natural forest, on the property above was cleared off.

Q. Whose fence was that?

A. It was a line fence between the two properties.

Q. Who owned it?

A. The oil company owned one part and the Fayette Coke Company owned the other.

Q. Did that line fence that you speak of, run in a straight line, or did it surround a piece of property there?

A. This line that I speak of was a straight line from back as far as this oil company's property extended.

Q. What portion of the fence did the Fayette Company own?

A. It was a line fence, and I suppose they owned half of it; I don't know about that; but it was a line fence.

133 Q. You don't know who erected that fence and paid for it?

A. Oh, no! it was erected before my recollection.

Q. Then, it was erected about when—it was an old fence, I believe?

A. It was an old fence there 33 years ago, when I first passed the place.

Q. Then, this fence you speak of as a line fence was there before this town was projected?

A. Years before; yes, sir.

Q. And you think that they used this old fence as a line for their property?

A. Of course. I husked corn on that property; it was a farm when I first came around here.

Q. Do you remember when Mr. Rainey bought this property?

A. No; I don't.

Q. Do you remember when Mr. Rainey's employees laid off, by a series of stakes, these coke ovens that have now recently been constructed?

A. I can't tell you, they have been laying off so many times there that I can't recollect the different times.

Q. You do recollect having seen stakes there?

A. Yes, sir, I do.

Q. How many years ago, do you remember?

A. No; I don't remember that; but four or five years ago I have seen them laying off there; I was working for Mr. Rainey at the time, across the river; he had property across the river.

Q. Are you prepared to say that you didn't see some of those stakes there about 1883?

A. No; I couldn't say; it might be 10 years ago; no, it ain't ten years ago, I will take that back.

Q. Was it shortly after he bought the property?

A. I think they did commence to stake it off shortly after he bought the property.

Q. And along the line where you see these ovens now, were some of the stakes, were there not?

134 A. No; there were no stakes staked off to lay out the ovens ten years ago; since I come to think, he hadn't got the whole of the Fayette property.

Q. But you have recollection of stakes being there some 6 or 7 years ago?

A. Yes, sir.

Q. How far from the Herbert residence is the nearest coke oven, as projected in this single line of ovens on each side?

A. From the residence?

Q. Yes.

A. Well, I didn't measure from the house up here, but we measured from the corner of the lot here 50 feet to the first oven; but that wasn't ready to operate, and it was about 12 feet further up to this one where they have fired.

Q. But my question was how far away the rear ovens are from the residence. You can compute it there roughly from the plan, just say about how far.

A. I would say about 130 or 140 feet.

Q. And how far would the nearest oven of the double row be from the residence?

A. That is about 60 feet, I guess. We measured it, but I have forgotten the distance.

Q. You remember the township road running along on the north side of the railroad track, and crossing about in front of the Herbert property, do you not? This old road that runs here?

A. Yes, sir; it run on the north side down here in front, and then it crossed over to the south side next to the river. It run on the north side down here to in front of the house here, on this here street, and then it crossed over on the south side, next to the river; that is, as you come northwest, that would be the direction; if you were going the other way, of course, it would be the other direction.

Q. Where did this road run to on the east?

A. Well, it run up first to the old Fayette works, and from
135 there to Hickory square, and when you got out there those roads would take you most anywhere in the United States.

Q. Then, in the other direction, it came down in front of the Herbert property and crossed the track there?

A. Yes, sir; crossed the track there and went on to Dawson; and then you could follow that road as far as you pleased to.

Q. What what the width of that road, do you remember?

A. There was one wagon track there, but when it was laid out as a township road it was 33 feet.

Q. Then, upon this township road in front of the Herberts' there was noticeable to the eye a township road, the width of which was about a wagon width?

A. Yes, sir; there was plenty of room for a wagon in front of the Herberts', and there was room to pass a wagon, too. But as a general thing the road was only used as a wagon road; hardly ever see wagons crossing on a railroad track.

Q. How far did Front street extend on the west of the Herbert property?

A. Well, now, I ain't prepared to say how far down it went, but it went down past Sedgwick street, because there was lots laid out, but how far down I ain't prepared to say. Right down here there was a branch railroad took up, and my understanding was the plot was to run down there to that branch railroad.

Q. But you are not prepared to testify as to its width and length, except as beginning at the westerly side of Sedgwick street, and from there up to the line of what is marked as lot No. 8?

A. Yes, sir; I know it there; but the distance below there I ain't prepared to say how far.

Q. And you assumed that its width was sixty feet?

A. I assumed it was sixty feet.

Q. In determining the distance from the Herbert residence eastward, you were limited by the eastern boundary of this old line fence?

A. Yes, sir.

136 Q. What was the distance you gave for that, do you remember?

A. 329 feet.

Mr. GARRISON: From what point?

Mr. SHIRAS: From the Herbert residence.

A. No; from the line of the Herbert lot; I didn't say the residence.

Q. And you then divided that 329 feet up into lots of 54 feet 6 inches in width, so as to correspond with the Herbert lots themselves?

A. Yes, sir; and we missed it just two feet.

Redirect examination by Mr. GARRISON:

Q. Do you recollect the size of these lots in front, as indicated upon the plan which you saw in the hands of Mr. Jones?

A. Yes, sir; 54 feet 6 inches.

Q. And you recollect that on the plan they were marked 54 feet 6 inches?

A. Yes, sir.

Q. When you began your measurements at the outer line of lot No. 2, the Herbert lot, and measured up to this old line, allowing 54 feet 6 inches to each lot, it brought you out within two feet of this line fence?

A. Yes. No, hold on. We commenced and we measured down; we didn't measure up; so I supposed I was two feet off from the start.

137 Q. Now, these stakes that you speak of, that Mr. Rainey had put down there six or seven years ago—where were those stakes, as you recollect, with reference to this Herbert house and these streets, Sedgwick and Front streets?

A. Those stakes that I saw of Mr. Rainey's some six or seven years ago, as we understood it, he was staking off ground there to build on, and he did build some houses; and we understood it was to be a company store; but that was below the house; there was nothing there to indicate any ovens at all.

Q. Were the stakes that he placed there in either Front street or Sedgwick street?

Objected to by counsel for defendant, for the reason that the witness has already testified that some six or seven years ago he saw these stakes upon Front street.

Q. What did you say? Were these stakes of Rainey's that you speak of in Front street or Sedgwick street, or were they on the sides of them?

A. They were down at the lower end of Front street, those stakes that I speak of six or seven years ago; and my understanding was then that he was going to build a company store right down there.

Q. Now, you spoke of a branch railroad that made a curve around and ran across at the far end of the double row of ovens. That branch railroad would cut off the far end of these coke ovens, would it?

A. If they would continue them on down it would cut them off; but if they continue them as they have started them, it would run up the branch.

Q. You say, as you recollect, that Front street extended down to this branch railroad that went up that ravine at the far end of those ovens. Now, I ask you to state whether these ovens extend out as far as that branch railroad running up that ravine.

A. Oh, no; they don't do that; because it's two miles up there.

138 Q. You don't understand me. Does the far end of this double line of coke ovens, reckoning from the Herbert house, extend up to the line of where that branch railroad was?

A. That branch railroad starts up before—those ovens extend further than the switch where that branch railroad starts up.

Q. Do the double row of ovens extend across that branch railroad?

A. No; not across; it extends further.

Q. You don't understand me. Now, indicate here on the plan where that branch line of railroad ran, if it ran to that double line of coke ovens.

A. It starts right off in the main road here; its starts right here; and of course if these ovens would curve as fast as the railroad it would still continue on; but if you come across here square, this railroad starts before——

Q. Now, then, that double line of coke ovens extends out as far as that branch railroad extends—I mean does it extend out to that branch railroad?

A. Of course it extends further than where the switch is; because the switch is here that starts up the branch.

Recross-examination by Mr. SHIRAS:

Q. What is your business?

A. I am a coal-miner.

Q. You have never had any experience in surveying or contracting or building?

A. I never surveyed any; no; I am not scholar enough to do any surveying.

GEORGE W. HERBERT sworn on his own behalf.

Direct examination by Mr. GARRISON:

Q. Are you one of the plaintiffs in this case?

A. Yes, sir.

Q. What is your age?

139 A. I was born in 1856; 35 years.

Q. Where were you born?

A. I was born in Dunbar township, Fayette county.

Q. Do you recollect when your mother purchased lots 7 and 8 in this town of Sedgwick?

A. I do.

Q. Do you recollect about what year that was?

A. I can't just say exactly, but I think it was between 1872 and 1873.

Q. Of whom did she purchase them?

A. From the Youghiogheny Oil Company.

Q. Who acted for the Youghiogheny Oil Company in the negotiations for the purchase and sale of those two lots?

A. Mr. Crider.

Q. Who was Mr. Crider?

A. He was supposed to be the attorney of the Youghiogheny Oil Company.

Q. Were you present when your mother and Crider were dickering about the sale of lots, at any time?

A. Yes, sir.

Q. State whether or not Crider had before him any map or plan of the town.

A. He had a plan of the town before him.

Q. Did you see it?

A. Yes, sir.

Q. What did that plan show?

A. It showed the streets.

Q. What streets did it show?

A. It showed that Front street.

Q. What other one?

A. And Sedgwick street, and several streets back that I can't just name, because they have never been used and I never paid any attention to them.

Q. Did the plan of lots show the lots as numbered on the plan?

A. Yes, sir.

Q. Do you recollect the location of lot 8 with reference to the property line of the oil company at that time?

140 A. Yes, sir.

Q. State where it was located with reference to that line.

A. Why, lot No. 8 was located adjoining the old Fayette coal works property, right back from the river.

Q. What was there to divide the Fayette Coal Company's property and the oil company's property—was there a line fence there?

A. Yes, sir.

Q. And lot No. 8 came up to that fence?

A. Yes, sir.

Q. What did your mother do with those lots?

A. She sold them.

Q. Where did you live at the time these negotiations for the purchase of lots 7 and 8 were going on—when your mother purchased 7 and 8?

A. Lived within not quite a hundred yards from this line adjoining the Youghiogheny Oil Company's property.

Q. How long did you continue to live there afterwards?

A. We moved—well, I can't say just when.

Q. You lived there for some time after these lots were bought?

A. Oh, yes.

Q. And, then, where did you move to?

A. We moved down where our parents live, on this property in dispute.

Q. Of course, you recollect when these two lots in controversy, Nos. 1 and 2, were purchased, do you?

A. Who from?

Q. Cochran.

A. Yes, sir; I helped purchase these from Mr. Cochran.

Q. And helped to pay for them?

A. Yes, sir.

Q. Do you recollect who built this house that you and George now own?

A. Yes, sir.

Q. Who did?

A. Mr. Dean, part of it.

141 Q. Where were you and your father's family living then?

A. Well, we were living right up within a hundred yards of this oil company's property.

Q. At the time your mother purchased lots Nos. 7 and 8, I ask you to state whether or not these streets were staked off?

A. They were.

Q. Didn't you see the stakes yourself?

A. Yes, sir; I was there when they surveyed it and went around with them.

Q. You recollect how Front street was located there?

A. In what way?

Q. You recollect the location of Front street, as indicated on this plan?

A. Oh, yes, sir.

Q. And do you recollect where Sedgwick street was located?

A. Yes, sir.

Q. How is this house that you and George now own located with reference to those two streets?

A. Well, our house stands on the corner of lot No. 1, on the two streets, Front street and Sedgwick street.

Q. How far did Front street extend up the river?

A. That is, on the east side?

Q. Yes, sir.

A. Well, it extended about 327 feet.

Q. But with reference to this property line between the Fayette coal works and the oil company's property—did it extend up to that line?

A. Yes, sir.

Q. How far did it extend in the other direction?

A. Well, I can't say just exactly, but I think it was about 200 or 240 feet on the west side of the house.

Q. Was Front street a straight street, or was it crooked?

A. Well, it was not direct straight; it run with the river and road, somewhere that way (indicating). You might call it a straight street.

142 Q. How did that bend come to be made in it there?

A. I suppose the way the ground lay.

Q. Where did that bend occur with reference to your property?

A. Well, it is pretty nigh straight in front; it might on the east side be a bend in it; but on the west side it is pretty nigh straight.

Q. What was the width of Front street and Sedgwick street, as nearly as you recollect, as shown by that plan as you knew it at the time it was staked off there?

A. Mr. Crider told us that we should have sixty feet there when he bought; that was the understanding.

Q. You never made any measurements on the ground to see just what the width was?

A. No; but I know from what was thrown out there then.

Q. Now something has been said about some stakes that were driven in the ground there by Mr. Rainey some six or seven years ago. I ask you to state what you know about that.

A. Well, I seen stakes drove, but I seen them on what I call the west side of the house.

Q. The side of the house where the double row of coke ovens is?

A. Yes, sir.

Q. How were those stakes driven with reference to Front street?

A. They were right on a line with Front street when I seen them.

Q. And on a line with your house?

A. Yes, sir.

Q. What were they driven there for, as you understood at the time?

A. I understood he was going to put up a store and buildings there back.

Q. Was there any ground staked off there until within the last year for the purpose of constructing coke ovens?

143 A. None that I know of.

Q. You know when Mr. Rainey purchased from the Youghiogheny Oil Company?

A. Yes, sir.

Q. Now state when Mr. Rainey first began making arrangements for the construction of coke ovens on this Front street.

A. Well, I can't just give you direct the date; I can give you the month; it was in July.

Q. July last?

A. Yes, sir.

Q. Well, how did he first begin? What did he do?

A. Well, he first began with the scoops.

Q. Making a foundation for the ovens?

A. Yes, sir.

Q. On what part of Front street did he first begin?

A. Commenced directly in front of the house to build his base walls.

Q. He began to excavate and build his base walls immediately in front of your residence?

A. He did.

Q. How much had he done there at the time you filed your bill here in court against him?

A. The restraining order, do you mean?

Q. No. How much had he done at the time you brought your suit?

A. Hadn't but very little done; just a little dirt scooped off.

Q. Then, at the time the court granted the restraining order on him how much had he done?

A. He had his base walls in front of the house—some of them was built up.

Q. Immediately in front of the house?

A. Yes, sir.

Q. Had he any ovens constructed on Front street at that time?

A. No, sir.

144 Q. What did you do when you discovered that Mr. Rainey was about to construct his ovens there?

A. Well, we went to Mr. Rainey and tried to compromise with him; that's about all.

Q. What did you say to him? Did you object to having the ovens there?

A. We did.

Q. Well, just state the substance of what you said to him.

A. We went to see Mr. Rainey; Mr. Rainey came there and sent for us, and before we got there he was gone; but we went to Connellsville and seen Mr. Rainey in the Huston building.

Q. At that time what had he done on the ground?
A. Not a great deal yet; he had his lines run.
Q. And his stakes put in?
A. Yes, sir.
Q. State what was said and done between you and Mr. Rainey at that interview.
A. Well, we went in and talked to Mr. Rainey.
Q. What did you say to him?
A. We asked him about the ovens there; and he said he was going to build ovens down there; and we told him he had better buy us out; he asked our price, and we told him, and he said he wouldn't think of it for a minute, at the price; and we had a conversation; then when we left, why, Mr. Rainey promised to meet us again, and he never came near. We went, but he never met us; he was to meet, but failed to come.
Q. What other protests and objections did you make, if any, to the construction of those ovens in the street there?
A. Well, we never made nothing, only what has been done here in Pittsburgh.
Q. He would not meet you after that?
A. No, sir; never met us.
Q. Before you filed your bill, at the time you told him he ought to buy you out, in your interview with him, did you object to his construction of ovens in the street there?
145 A. We did, and told him that we didn't want to go into any lawing with him, or anything of that kind; that we weren't able.
Q. You say that up to the time of the granting of the restraining order on him, he had made some excavations and constructed foundation walls for his ovens immediately in front of your lot?
A. Yes, sir.
Q. What did he do after the restraining order was granted?
A. Well, he ceased work on the street for about one week, and then he came back, and there are ovens down within fifty feet of our lot on Front street.
Q. A double row or single row?
A. He built a single row first, and then started another row.
Q. Has the work upon those ovens been continuous since he began after the restraining order, down until the end of the work that already appears on the ground?
A. He has, with the exception that I spoke of.
Q. When did that week or so occur—the last week or so?
A. Yes, sir; the last week or so he hasn't worked any below the house, but he has never ceased on the upper row.
Q. How much did you and your brother pay for this house and lot?
A. $1,000 for the house and lot.
Q. What was the condition of the house and the improvements on the ground at the time of purchase?
A. They were nothing extra when we purchased.
Q. Have you made any improvements since?

A. Yes, sir.

Q. Just describe them.

A. We have, in fact, almost built a new house; put a well down and put out fine fruit trees.

Q. Did you build a fence around the lot?

A. Not clean around it—paled it in front and back.

Q. How many rooms are there in the house?

146 A. There's six rooms and a kitchen; that is, taking the whole building.

Q. Describe what repairs and improvements you have made on the house since you purchased it, in a general way.

A. We have put new weather-boarding on, and a new roof, and plastered one room or so.

Q. Done any painting?

A. We have ordered it.

Q. Are you acquainted with the value of property of that kind in the neighborhood?

A. To a certain extent, I am.

Q. What do you regard this property as reasonably worth?

Objected to by counsel for defendant, unless the witness shows that he is competent to answer; he having failed to show that he has any knowledge of the value, based upon the sales of property in that locality, or in any other way, to render him competent to answer the question.

Q. State if you are acquainted with the value of real estate in that vicinity.

A. I am, to a certain extent.

Q. Have you known of sales of property around there?

A. Yes, sir.

Q. Well, from your knowledge of the values, what do you say the property is reasonably worth, if these coke ovens were not there?

A. Well, I value the property, at the least calculation, at $2,500.

Q. If these coke ovens should be constructed and operated through there, on Front street, finished and operated, what effect would it have upon the value of this property?

A. I wouldn't like to live there.

Q. That is not an answer to my question. What effect would it have upon the value of this property?

A. Well, I think it would destroy it.

147 Q. Could it be occupied as a residence at all?

A. No, sir; it might be for some to live in; but I don't think we could.

Q. What is the means of ingress and egress to and from the house—where you get in and out to the house—what part of the house?

A. They go direct in off of Front street into the cellar, and then they come in off of Sedgwick street in the back way.

Q. Is that the usual way of your getting in and out of the house?

A. Yes, sir.

Q. What would this property of yours be worth if those ovens are constructed there and operated?

A. I wouldn't value it at nothing; I wouldn't pay the taxes on it.

Q. If the ovens are completed as indicated there by what is already constructed and the improvements on the ground, how close would the ovens come to your house?

A. Why, they couldn't be completed unless the house is moved.

Q. I want you to state whether you were present when Mr. James and Mr. Wingrove made the measurements on the ground there around and about your property day before yesterday.

A. I was there when part of it was done, not when it was all done.

Q. Look at Exhibit No. 2, and state whether that plan or plot indicates the location of your lot and the location of the house and surroundings, of the ovens, etc., correctly—as they now are.

A. It does.

Q. State whether that single line of coke ovens as now constructed is altogether in this Front street—that is, up as far as the Fayette Company's line.

A. They are right on Front street.

Q. How about the double line of coke ovens, on the other side of your house?

148 A. Well, this outside line is supposed to be right along on it.

Q. You saw where the coke ovens are erected, did you?

A. Yes, sir.

Q. And the outer row of coke ovens would be right on the line of the street, would it?

A. Yes, sir.

Q. Do you recollect that old township road there?

A. Yes, sir.

Q. Look on the plan and see if that, as you recollect it, indicates the location of that road. With reference to your property and those two streets?

A. Yes, sir; it does.

Q. Now, Mr. Herbert, you state that you have lived there ever since this town plan was layed out. I ask you to state whether this town of Sedgwick and these streets that you have spoken of, are matters of general understanding and spoken of in the neighborhood as the town of Sedgwick?

A. Yes, sir.

Q. When did you last see the plan of that town of Sedgwick?

A. Well, I have never seen it since we bought 7 and 8.

Q. In 1872 or '73?

A. Yes, sir.

Cross-examination by Mr. SHIRAS:

Q. What is your business?

A. My business is a miner.

Q. Have you any experience as a surveyor, contractor or builder?
A. No, sir.
Q. And you say that your knowledge of the width and length of the streets and the width and length of the lots is based upon conversations occurring at the time your mother bought these lots Nos. 7 and 8. Is that correct?
A. They are, according to the plan that I saw.
149 Q. How old were you at that time?
A. Between fifteen and sixteen years old.
Q. How long ago was that?
A. I suppose that was eighteen years ago, maybe.
Q. You say that the house you own at present was built upon the corner of Sedgwick and Front streets. How do you remember that?
A. Why, I saw the stakes and the lines; they were there when they put the property up.
Q. Was this house built before or after your mother bought?
A. I think it was built about the same time.
Q. Was that plan of lots shown you before or after the commencement of the construction of the old Dean house?
A. Before or after?
Q. Before or after.
A. It was shown about the time of the construction, when Mr. Crider was there and wanted us to buy those lots, when this house was going up.
Q. When was it that Mr. Rainey bought this property from the Youghiogheny River Oil Company?
A. If my memory serves me right, it was in 1879.
Q. And this was some six years before you purchased?
A. Well, not exactly. Of course about six years before we got the deed; we didn't get the deed until we paid for it.
Q. When did you get the deed for this property?
A. In 1885.
Q. Did you have your title examined?
A. Which?
Q. When you bought the property?
A. Yes, sir; from the record there in Uniontown.
Q. Are you aware that the property that Mr. Rainey bought included Front street as a portion of the land conveyed by the Youghiogheny River Oil Company?
A. No, sir.
Q. Don't you know of that as a fact?
A. No, sir; I don't.
150 Q. Do you deny that Front street was included in the grant of the land by the Youghiogheny River Oil Company to Mr. Rainey?
A. Do I deny it?
Q. Yes.
A. According to our deed, we still hold the frontage there.
Q. Do you deny that the deed from the Youghiogheny River Oil Company to Mr. Rainey does include that part of Front street run-

ning from the line of lot No. 8 down to the western line of your property?

A. I do deny it.

Q. Have you ever examined that deed?

A. Yes, sir.

Q. Were you living in this locality when Mr. Rainey bought this property?

A. Yes, sir.

Q. Do you know the purpose for which he bought the property?

A. Not at the time I didn't.

Q. Did you know that he was a coke and coal operator at the time he bought?

A. No, sir.

Q. Well, shortly afterwards?

A. After we got in there awhile we learned that he was.

Q. And before you entered into any negotiations for the purchase of this property from Mr. Cochran?

A. He was in the coke business over here (indicating on plan) when he bought this property.

Q. You say that some eighteen years ago you saw these stakes that were to designate the lots and streets?

A. Yes, sir.

Q. Are you prepared to say, from your recollection of what occurred then, that Front street was a 60-foot street?

A. I recollect that Mr. Crider told me that Front street was a 60-foot street there, thrown out as a commons, for the use of the land.

151 Q. How about the width of the other streets, do you have any recollection specially about those?

A. I have on Sedgwick street, specially; it was a 60-foot street.

Q. You have seen no plan of the lots of this company since then, or had any representations made to you by the agents for this company since the time of the original negotiations?

A. I have seen no plan of lots since I saw that of Mr. Crider's.

Q. Do you recollect the length of Front street, from your property eastward, from the representations then made, or did you determine its length by reason of this alleged boundary fence?

A. Well, I took it both from our deed and from the fence and from the map that I saw.

Q. Have you ever seen any deeds for lots Nos. 3, 4, 5 and 6?

A. No, sir; I have not.

Q. Do you know of any such being in existence?

A. No, sir.

Q. Do you know of any of those lots ever having been sold except to Mr. Rainey?

A. No, sir.

Q. Do you know whether the length and width given there is accurate or not?

A. I measured them several times, and they always come out.

Q. How did you fix upon 54 feet 6 inches as the correct width?

A. By my deed.

Q. I refer to lots 3, 4, 5 and 6.

A. By the plan.

Q. Then you recollect, that when you saw this plan of lots 17 years ago, it called for 54 feet 6 inches for lots that have never been sold except to Mr. Rainey, is that correct?

A. The lots were all laid out there. They were all in the same plan as No. 7 and 8 at the time.

152 Q. You say you paid a thousand dollars for this house and lot, in 1885?

A. Yes, sir.

Q. Some of these improvements you speak of were in the nature of repairs, were they not?

A. Yes, sir.

Q. What has it cost you to put on this weather-boarding and give it one coat of paint?

A. And roof it?

Q. And roof it.

A. Well, we couldn't do it under four or five hundred dollars; we couldn't do it for that.

Q. Have you any memorandum to show exactly what you did pay for them?

A. I think there is, laying around. I wasn't attending to the business, but I seen some bills come in once in awhile.

Q. When were these improvements made?

A. This fall a year ago on the house and then some a couple of years ago when we remodeled the other.

Q. When did you put on the weather strips, weather-boarding and paint the same?

A. Last fall, I believe; this fall a year.

Q. Was that since Mr. Rainey began work on his ovens?

A. No, sir.

Q. How many lots were there, to your recollection, in this plan?

A. Well, if my mind serves me right, I think there were from a hundred to a hundred and thirty.

Q. How many were there sold that you know of?

A. Not more than four, as I know of; that is, quarter-acre lots.

Q. And how many houses were built upon those four lots?

A. There is only this one.

Q. How long is it since the Youghiogheny River Oil Company has sold any of these lots?

A. They haven't sold any since Mr. Rainey bought in '79, I think.

153 Q. Were they sold to him as building lots, or simply as a tract of land, including these particular lots?

A. They included just what his deed will show.

Q. Were there any sales of these lots as building lots since 1873?

A. Yes, sir.

Q. When?

A. Mr. Rainey bought one in 1889.

Q. I refer to the Youghiogheny River Oil Company?

A. No; not from them, because Mr. Rainey had it all bought up except these four.

Q. Then, from 1873 down to the present time the Youghiogheny River Oil Company has sold but four of these lots as building lots?

A. Yes, sir.

Q. How far does Front street extend to the west of your property?

A. Well, I never measured it exactly, but I laid it about 240 feet, or somewheres along there.

Q. You are uncertain, then, as to the length?

A. I am as to the correct length; yes, sir.

Q. How much have you paid out in money for repairs and improvements on this land since 1885?

A. Well, as near as I can tell you, we have paid over $2,000; counting property and all.

Q. No; I ask you to answer my question as put. How much have you paid out in money for improvements and repairs upon those lots, since 1885?

A. About 11 or 12 hundred dollars, as near as I can tell you.

Q. Can you state, in a general way, for what this money was used?

A. Well, it was used for fruit and other trees, fixing the house, digging the well, and improving the ground by lime, etc.

Q. What did it cost you to put in those trees?

154 A. I don't know exactly, as I am not a resident of the house, and I never paid any particular attention.

Q. How do you compute that there has been over $1,000 paid for improvements and repairs?

A. By estimates of what we paid out.

Q. I wish to ask you in detail what these improvements cost. What is your recollection that was paid for planting these trees?

A. Some of them cost pretty deep.

Q. Give your recollection of the amount.

A. We have some 70-odd trees, and some of them cost two and three dollars.

Q. What has been the total outlay?

A. I told you the total outlay.

Q. No; total outlay for trees?

A. I can't tell you just that.

Q. Does it amount to $50?

A. $50 wouldn't buy the half of them.

Q. I am not asking you what it would buy. Can you say that $50, or more, has been paid for the purchasing of those trees and the planting of the same?

A. Yes, sir, I can say that.

Q. From whom did you buy?

A. I can't tell you the agent, as I am not a resident. I suppose I can go home and get it.

Q. You say some of the trees cost one or two dollars apiece?

A. Some of them more than that.

Q. How much was paid for putting on this weather-boarding?
A. It would have cost $500 or $600 or maybe $700 for the contract.
Q. You say it has cost you that?
A. It would have cost us that.
Q. Who was the contractor who made those repairs?
A. We got it put on by a brother. Of course it didn't cost us as much as if we had got outsiders to have done it.

155 Q. You say this property would be worthless; in case these coke ovens are operated?
A. Yes, sir; I do.
Q. What is the depth of those lots?
A. Back?
Q. Yes.
A. 200 feet, I think; something like that.
Q. And you mean to say that no structure could be erected on the rear end of these lots that could be used as a place of residence, or stores?
A. At the back end?
Q. Yes.
A. It might do, if you wanted to be smoked.
Q. Don't you know of any dwellings and stores built within 200 feet of the coking plant in that neighborhood?
A. Within 200 feet?
Q. Yes.
A. Well, now, there might be; but there is none right direct there; some of Mr. Rainey's may be stuck up some place against coke ovens; that's the way he builds them.
Q. At the Jackson mines, aren't there stores and dwellings within 200 feet of some of the coke ovens there?
A. There is no stores.
Q. Are there any dwellings?
A. There's dwellings, I suppose, within 200 feet; but they are on the opposite side.
Q. Are they not rented and occupied most of the time?
A. Some of them is and some ain't.
Q. Isn't the same true at Broadford and the Tyrone mines?
A. Oh, yes.
Q. There are residences and stores within 200 feet. Don't you recollect any stores within 200 feet of the ovens of the Tyrone mines?
A. I don't know just exactly where the store is; I know there's dwellings close.

156 Q. Then, when you say that this property would be worthless, you mean by that if it were to be used by you as a residence with the house at the corner of these two streets that you speak of, or do you mean to say that it has no market value whatever?
A. Not if these ovens continue where they are now.
Q. Do you say that Mr. Rainey didn't commence the construc-

tion of any of the ovens indicated there on the plan before last July?

A. It was along in July when he commenced on that town site there; I can't tell you the date, but it was in July.

Q. Mr. Wingrove testified to having seen stakes upon Front street in front of, or close to your house, and that the stakes, as he understood it, were placed there for the purpose of erecting a warehouse upon this street. Do you recollect when those stakes were taken away?

A. No, sir; I don't.

Q. Did you object to the placing of those stakes there and the possible erection of this warehouse?

A. No, sir; we didn't.

Q. Who took those stakes away, do you remember?

A. I suppose they took a good many of them away there when they graded for this double block, scooped them out; they were there within the last year.

Q. You say you met Mr. Rainey and objected to the building of these oven walls in front of your house?

A. We objected to his putting ovens in front of the house.

Q. And you suggested that he should buy your property?

A. I think we did; I am not sure, but I think we did.

Q. And you asked him $2,500 for it?

A. Yes, sir.

Q. And you then stated that Mr. Rainey failed to meet you the second time, as he promised?

A. Yes, sir; he did.

Q. At this conversation with Mr. Rainey, he first stated that he thought the price was too high that you offered it for, did he not?

A. He didn't state anything of the kind. He said he wouldn't think of it for a minute.

157 Q. You have testified that he said the price was too high, or something to that effect.

A. I said just what I now tell you.

Q. Didn't he, however, offer to make a trade for this property?

A. Why, he was talking about it, and that was what he was to meet us for.

Q. Didn't he offer to give you twice the amount of land and build you an entirely new house, if you would let him build his ovens as he desired?

A. No, sir; he was talking about it. He had some old land back there that was worthless.

Q. Did he say it was worthless?

A. He said it was worthless to him.

Q. But he did offer you a larger tract of land, and offered to build you a house on the land?

A. No, sir; he didn't offer us any certain amount; he just offered us a trade, and that was why we were to meet him. Although he said his line was staked and he was going through.

Q. And didn't he tell you at that time that he owned that tract of land upon which he intended building these coke ovens?

A. Oh, yes.

Q. What visible evidence is there there to-day to indicate a town site with streets of a certain width and length and with streets of a certain width and depth?

A. There is just as much there as there was 18 years ago; may be a little more.

Q. Have you paid for this lot yet?

A. Paid for it?

Q. Yes.

A. We wouldn't have the deed if we hadn't. We have paid for it, yes.

Q. Have you, in any way, by contract or otherwise, limited your disposition of this property?

A. No, sir.

158 Q. You have entered into no agreement to sell or not to sell the same?

A. Well, now, perhaps I had better give you the statement, as to what this property was bought for——

Q. Just answer this question.

A. I never entered into any agreement not to sell, or anything of the kind.

Q. Neither at that time, nor since?

A. No, sir.

Q. Has your brother done so?

A. As far as I know, he hasn't; he couldn't, for the reason I tell you.

Q. What reason?

A. We bought that as a homestead for the old folks, and gave it to them to live in as long as they both lived, and when they are gone, the property falls off to us.

Q. How did you make that arrangement?

A. It is on record there in Uniontown; it is a permit given under this deed. We gave them a permit to live there as long as they both lived, and after they are gone the property falls back to us.

Q. You say that the grant of this life estate is on record?

A. I think it is.

Q. Are you married?

A. Yes.

Q. Is your brother?

A. No, sir.

Q. This deed was regularly executed by yourself and your brother, this deed or grant of life estate?

A. Which, the permit?

Q. What we call a life estate.

A. Yes, sir.

Q. Then you are not in a position to make a sale of this property, without your father and mother joining in the deed?

A. Not exactly, we couldn't, without their consent.

159 Q. Have they made any arrangement in regard to the disposition of their interest in that property?

A. No, sir. They are old folks and nobody to look after them but us.

Q. Who did you buy this property from?

A. James Cochran.

Q. Who do you work for now?

A. I work for the Jackson Mines Company.

Q. Who owns the Jackson mines?

A. Ken. Ewing; I think James Cochran owns part of the shares in it.

Q. Who manages the mine?

A. Inside?

Q. No; the whole business, the active management of the mine?

A. That is run by George Cochran.

Q. Who is George Cochran?

A. He is a son of James.

Q. Has Mr. Cochran advised you not to sell or negotiate for the sale of this property with Mr. Rainey?

A. No, sir.

Q. You state you are acquainted with the value of real estate in the neighborhood; have you any knowledge of any recent sales in the immediate vicinity?

A. Within half a mile or three-quarters back.

Q. What kind of property?

A. Well, it was a fair property.

Q. What was it sold at by the acre?

A. Well, I can't just say exactly how much was in it; it was probably a quarter or half of an acre, or something like that. It was sold for $1,000.

Q. There are improvements on that?

A. Slightly.

Q. How near Dawson is that?

A. A mile or a mile and a quarter from Dawson.

Q. What does ordinary farming land sell at by the acre there, unimproved?

160 A. There ain't very much farm land around there, that I know of.

Q. What would such property as surrounds this of yours, now owned by Mr. Rainey, be worth, entirely independent of its present use for coking purposes, but merely as a residence—what is it worth by the acre?

A. On the front there, from what Mr. Rainey told me, I would place it pretty high.

Q. What were these lots sold at, at the time you bought?

A. I believe a $150 apiece for a quarter of an acre.

Q. And but four of these lots, numbering something like 100, were sold at that price by the Youghiogheny River Oil Company?

A. These lots were sold by Youghiogheny River Oil Company at $150.

Q. And they sold but four out of a hundred lots? and obtained no more than $150 a lot?

A. They might have sold more, but I have no account of them.

Q. But wouldn't you know whether any other lots were sold by this company as building lots, when you were residing there on the premises?

A. I never knew more than these four.

Q. Have you ever tried to sell this property since you bought it?

A. No, sir.

Q. You say this map here corresponds with the map shown you by the agent of the Youghiogheny River Oil Company some 17 or 18 years ago, do you?

A. This part of it does (indicating on plan).

Q. So far as the lots and streets are concerned?

A. Yes. And this was all laid out back here also (indicating).

Q. What is there there to-day to indicate the eastern boundary of lot No. 8?

A. There is this old line from here.

Q. Is there an old fence there, or not?

161 A. Not right there there ain't; but on up.

Q. How did you establish the line of the lot, then?

A. By measurement.

Q. From what point?

A. Right direct from the corner of this house.

Q. Well, how did you know where to stop when you made that measurement?

A. By that line; I knew where the line was.

Q. What is there to indicate the line to-day?

A. Well, you can see where the fence went along it, where it has been plowed, and see the line at the edge of the forest there.

Q. How long ago was that plowed?

A. I ain't knowed it to be plowed for seven or eight years.

Q. Then it was plowed since—was it plowed since the purchase of this property by Mr. Rainey from the Youghiogheny River Oil Company?

A. I think, if my mind serves me right, when we owned 7 and 8 lots there, we had it in, planted. We never built on it.

Q. When did your mother last own lots 7 and 8?

A. I think she sold out in '79.

Q. In reference to that sale—when was this plowed ditch made, before or after?

A. Well, I think it was before; we didn't plow up anybody else's ground that didn't belong to us.

Q. Who made that plowed line?

Q. Or that ditch that you speak of?

A. I never seen no ditch.

Q. What is there there to indicate any line at all upon the eastern boundary of lot No. 8?

A. There is not a great deal to indicate it, only, as I told you, I took it by measurement from there. I know just about where it is, but I might be a foot or two out of the way.

Q. Then you don't pretend to be accurate in regard to the commencement of this point where you made your survey?

162 A. From here (indicating on plan) to the line.

Q. You say you don't know within a foot or so?

A. It might be 2 or 3 feet off.

Q Then this eastern line of lot No. 8 may be two or three feet too far east or too far west?

A. It may be on this plan, yes; not over that.

Q. And if that were the case, would it not necessarily disarrange the lines of all the other lots?

A. No, sir, I don't think it could. by starting here. (The witness here points to the corner of the residence.)

Q. If you started there, and made a survey east, how would you determine the eastern boundary of lot No. 8?

A. The eastern boundary?

Q. Yes.

A. By this old line.

Q. But you have already stated that there is no old line there that is noticeable?

A. Well, there is nothing more than maybe a little bank throwed up there.

Q. Then, in making up this plan, you and Mr. Wingrove and Mr. James consulted together, and made the plan from the best of your recollections?

A. No, sir; I had nothing to do with the making of the plan; I measured this separately myself several times. I got there some time after, and I guess they were pretty near done when I got there. The way I got mine was by direct measurements.

Q. Then you did not assist Mr. James in the construction of this plan?

A. No, sir; no more than carrying his tape-line around.

Hearing adjourned to meet Monday, Dec. 14, 1891, at 11 o'clock a. m.

And now, to wit, Monday, Dec. 14, 1891, parties met at the hour appointed, at the office of J. M. Garrison, Esq., and the taking of testimony on behalf of the plaintiffs was resumed.

163 Present: J. M. Garrison, Esq., of counsel for plaintiffs, and Geo. Shiras, 3d, Esq., of counsel for defendant.

GEORGE W. HERBERT recalled on behalf of plaintiffs.

Direct examination by Mr. GARRISON:

Q. You stated in your examination on last Thursday that Mr. Rainey at one time drove in stakes along Front street, for the construction of buildings there?

A. I did.

Q. Now, state whether those stakes were in Front street, or along the line of Front street.

A. They was on the line of Front street direct from our house, on the west side.

Q. And you stated that you made no objection to his doing so?

A. I did.

Q. What is the age of your parents, respectively?

A. My father is about sixty-seven years old, and there might be a year's difference in their ages.

Q. What is their physical condition?

A. Well, my father is pretty strong; my mother is subject to neuralgia.

Q. Are they old and frail, or what is their physical condition?

A. My father is pretty strong, but my mother isn't.

Q. At the time you and your brother purchased your property from Cochran, how was Front street at that time—how was it used, or was it used?

A. Why, it was used as a roadway into the house and out of it.

Q. Was it used as a passage-way for teams?

A. Yes, sir.

Q. Was it traveled any?

A. Yes, sir.

164 Cross-examination by Mr. SHIRAS:

Q. When you state that these stakes were on the line of Front street, and not on Front street and in front of your property, do you mean to say that you didn't testify previously that they were on Front street, or that you wish to correct that statement, and have it understood that you were under misapprehension when you so testified?

A. I may have misunderstood Mr. Shiras' question. The stakes were on the line of Front street; just direct on a line with our house.

Q. You heard Mr. Wingrove testify that the stakes were on the street, did you not?

A. I heard him testify to so many stakes; I couldn't say whether these are the ones he testified to, or not.

Q. Supposing there were stakes along the line of Front street, do you mean to say that there were no stakes on Front street at the time you bought the property, or shortly before, or that you don't remember?

A. Well, there was none there, as I remember.

Q. What were these stakes that you noticed along the line of Front street for?

A. Which?

Q. That you have spoken of as being along the line of Front street, and not on the street.

A. Why, they was supposed to be for a store-room.

Q. Don't you know, as a matter of fact, that these stakes that you are testifying to were stakes placed there to indicate the location of a line of ovens, and not for a storehouse?

A. No, sir, I don't.

Q. Did Mr. Rainey have any works there at that time, at all?

A. Yes, sir; he had works over the river.

Q. But not on this side of the river?

A. No, sir; not when these stakes were laid for the store-room.

165 Q. Did he have any houses on this side of the river?

A. Yes, sir.

Q. What houses were there there, of Mr. Rainey's, at the time you bought this property—on this side of the river—on your side of the river?

A. Well, I don't remember whether these houses were there when we bought this property, or not; but I know he has——

Q. That isn't the question; whether he has them there now or not. You are not prepared to swear that he had houses on the same side of the river your house is on at the time you bought this property? You are not prepared to say he had houses there at that time?

A. I am not sure; I wouldn't be positive.

Q. What would be the object of Mr. Rainey's building a warehouse on that side of the river, if he had no plant or houses there at all?

A. That's a thing I couldn't tell you, no more than what I understood when these stakes were drove. He had works on the other side of the river, and he owned property around there.

Q. Was there a bridge across there?

A. No, sir.

Q. Well, isn't it more likely that those stakes were there to indicate a line of coke ovens, rather than for a warehouse?

A. No, sir; they wasn't.

Q. Who told you it was to be a warehouse?

A. It was common talk among the neighbors; and, more than that, I would state here, that Mr. Rainey has no coal on this side of the river at all, and we never supposed that there would be any coke ovens there.

Q. Isn't there coal upon this oil tract?

A. There might be a little, to a certain extent; it wouldn't be enough——

Q. Don't you know that Mr. Rainey owns that?

A. I suppose he does.

166 Q. Then, there is coal there, and he has bought it for the purpose of using these very ovens?

A. It wouldn't justify a person to build ovens to coke this amount of coal that is there.

Q. You have stated that there was travel on the property in front of your house at the time you bought it?

A. Yes, sir.

Q. Wasn't that travel along this old township road?

A. Partly, and partly on the street, it never made no difference whether they took the road or the street.

Q. This township road, then, ran along between the railroad and your house?

A. Yes, sir.

Redirect examination by Mr. GARRISON:

Q. In your testimony on last Thursday you said that you knew of dwelling-houses within two hundred feet of coke ovens. I ask

you to explain in regard to those houses; by whom are houses of that kind generally owned?

A. They are owned by the companies.

Q. What companies?

A. By the coke companies.

Q. Do you know of any that are owned by private individuals erected at that distance from coke ovens?

A. I do not.

Recross-examination by Mr. SHIRAS:

Q. When you testify that you know of no private houses built within 200 feet of coke ovens in these localities referred to, don't you know that the coke companies own all the property within 200 feet of their coke ovens in these particular instances?

A. I suppose they do; as far as I know they do.

Recess taken until 2 o'clock p. m.

167 THOMAS H. HERBERT, one of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. GARRISON:

Q. What is your age?

A. I will be 33 the 18th of this month.

Q. You are one of the plaintiffs in this suit?

A. Yes, sir.

Q. Do you recollect when your mother bought lots Nos. 7 and 8 in the town of Sedgwick?

A. Yes, sir; I recollect very well the occasion, but I don't know the exact date.

Q. Where were those two lots located, with reference to the location of the Fayette Coke Company's property?

A. Seven and eight?

Q. Yes.

A. They were located right on the corner next the line between the oil company's and the Fayette company's property.

Q. Do you recollect, at the time your mother bought those two lots, or at any time, of seeing this plan of Sedgwick?

A. No, sir; I don't recollect of ever seeing a plan of the town.

Q. Do you recollect, at any time, of seeing stakes on the ground there, indicating streets in that locality?

A. Yes, sir.

Q. Did you see those at the time your mother purchased?

A. Yes, sir; I was at home, and I saw stakes that were set there for the streets and these two lots.

Q. What two streets were so staked off as you recollect, at the time, and since?

A. Front street and Sedgwick.

Q. Your mother sold those two lots, after she had kept them for some time, did she?

A. Yes, sir.

168 Q. To whom did she sell them?

A. James Cochran.

Q. Then you and your brother George bought this property that you now own?

A. Yes, sir.

Q. And you have owned it ever since?

A. Yes, sir.

Q. Where is that house situated with reference to the streets in this town?

A. That house that we now live in?

Q. Yes, sir.

A. It is on the corner of Front street and Sedgwick street; flush with the street on the corner.

Q. At the time your mother purchased lots 7 and 8 where did you live?

A. We lived, I suppose, within 100 yards of the corner of those lots, 7 and 8.

Q. You lived there with your parents?

A. Yes, sir.

Q. From there where did your parents move?

A. We moved to the house we now live in.

Q. Who owned it when you moved into it?

A. James Cochran.

Q. Subsequently, you and your brother George bought the property?

A. Yes, sir.

Q. And have continued to live in it ever since?

A. Yes, sir.

Q. At the time you purchased this property, what was the condition of Front street there, in front of and near your house?

A. What was the condition of the street?

Q. Yes. How was it being used, if it was being used at all?

A. It was used as a public highway to get to and from our house.

Q. Was it used for travel, with wagons and teams?

A. Yes, sir.

169 Q. How did this public road run there with reference to your property?

A. This public road that came up from Dawson?

Q. Yes.

A. Well, it came up and crossed over the railroad just in front of our lot; not just exactly in front of the house, but in front of the lot; crossed over the railroad and ran parallel with the street.

Q. At the time you purchased the property, state if you purchased it with reference to this Front street as a means of ingress and egress from your property and a highway.

A. Undoubtedly we did.

Q. How recently, as near as you can recollect, has it been since you saw those stakes that you speak of staking off the streets?

A. On these lots on this street?

Q. Yes.

A. Well, now, the stakes stood there for quite awhile after my mother had purchased 7 and 8 and after the house we lived in was built; the stakes stood there for quite awhile, but I can't say exactly how long it has been since I saw these stakes.

Q. Where did this Front street terminate at the lower end?

A. I suppose that would be the east end, would it? That is, down the river from our property?

Q. Yes; the end that the single row of ovens is on; where did the street terminate on that side?

A. Is that on the east end, up the river?

A. Yes.

A. It terminates at this boundary line that ran between the oil company's property and the old Fayette property.

Q. And where did it terminate on the other end?

A. There was a branch railroad ran up the hollow, up the ravine, and this street ran down to this railroad.

Q. You don't know the exact point where it terminates?

A. No, sir; I can't say the exact point.

170 Q. After you moved into that property, with your parents, the property that you purchased, I ask you to state how this Front street continued with reference to obstructions of any kind, or what its condition was up until recently?

A. Before we purchased this property, and long afterwards, until Mr. Rainey obstructed this street with his coke ovens, the street was in condition to be traveled over.

Q. And did you use it as a means of getting in and out to your property?

A. Yes, sir.

Q. Your house also fronted on Sedgwick street? State what part of the house you went in and out of mostly.

A. Well, mostly, we went in and out of the door next to Sedgwick street.

Q. But the front of the house is on Front street?

A. The front of the house is on Front street.

Q. When did Mr. Rainey begin operations there for the construction of coke ovens, about when, as nearly as you can recollect?

A. On Front street?

Q. Yes.

A. He began to survey and stake off for this line of coke ovens some time before the 1st of July. I don't remember exactly when, but along about the 1st of July, he commenced to break ground there for coke ovens on Front street.

Q. That was after he had done his surveying, of course?

A. Yes, sir.

Q. Well, what did you say or do when they began excavating there, in relation to that work?

A. I went to Mr. Mitchell, I think, first, and I remonstrated with him, and I told him it would be an injury to us and would destroy our property; and I told Mr. Mitchell I would a great deal rather he would just buy the property from us.

Q. Did you ever have any conversation of the same character with Mr. Fox, the superintendent, that you can recollect?

171 A. Yes, sir; I talked with Mr. Fox on the same subject, and I told him that he was destroying that property there and told him there was a street there.

Q. That was after the excavating had been done?

A. Yes, sir; that was at the commencement.

Q. At the commencement of the excavation?

A. Yes, sir.

Q. What effect did your remonstrance have on them, did they continue on with their work?

A. Yes, sir; they continued right along.

Q. Well, then, you then brought this suit, did you? After that you brought this suit?

A. Yes, sir; after we had remonstrated with Mr. Mitchell and Mr. Fox, we brought this suit.

Q. Then, up to that time, what work had been done—anything additional to the excavation?

A. They had still been continuing their work of grading for the foundations and making preparations for the coke ovens.

Q. Did they continue on at the work after you brought your suit?

A. Yes, sir.

Q. What did they do, after you had brought your suit, and up to the time you got your restraining order?

A. They had still gone on with making preparations for their ovens; that is, by grading for the foundations for them—and when this restraining order was granted, they had started to lay their base walls for their ovens right immediately in front of our house.

Q. And when the restraining order was granted?

A. They stopped operations immediately in front of our house.

Q. How long did that cessation continue?

A. Probably it continued a week, or maybe a little more; I couldn't say exactly how long, a week, anyway, I think.

Q. Then, what did they do?

172 A. They still continued on building their ovens down on Front street.

Q. Have they continued in that way pretty much ever since until the present time?

A. Yes, sir.

Q. And have constructed a number of ovens there, have they?

A. Yes, sir; they have ovens constructed on both sides of our house on this street.

Q. Do you recollect the number of ovens on each side? What is the number of ovens, if you recollect, in the double row?

A. That are completed?

Q. Yes.

A. Well, now, I can't tell you exactly.

Q. Do you recollect the number of ovens in the single row that are completed?

A. Yes, sir; there's about 18 or 19 now with fire in them.

Q. For what purpose is that fire in them?

A. It is always necessary——

Q. Is it for the purpose of drying them out for making the coke?

A. It is necessary to dry them out before they make coke in them, dry them out moderately.

Q. Are there any materials on the ground there for the construction of the tramways, or whatever you call them, for the purpose of charging the ovens—larry tracks?

A. Yes, sir; the larry track is laid on this single block of ovens to the end of the ovens, and there is some railroad iron used for that purpose laying on Sedgwick street now.

Q. What obstructions, if any, are there in this open space immediately in front of your property?

A. This wall, that I spoke of as partly built in front of our house, and there's piles of stones lying all along there and brick and other material that is used in building ovens; mortar boxes, etc.

173 Q. When did you observe the last work that was being done on the ovens about there?

A. In building coke ovens?

Q. Work on those ovens.

A. They are working there now, putting fire in them and are working there every day.

Q. Getting them ready?

A. Yes, sir.

Q. I want you to describe this house, and the improvements that are on the premises there, fences, fruit trees, etc.

A. As it now stands?

Q. Yes.

A. Do you want the size of the house?

Q. Yes; how many rooms?

A. The house is 32 feet long by 16 feet wide, and there's a kitchen part built to it that is 16 x 18 feet, and there is a basement; counting the basement two rooms, there would be six rooms in the whole building, and the kitchen.

Q. How about the fence around the property, what condition is it in?

A. Well, our fence was in very fair condition. It is not in a very good condition at the present time, in front of Mr. Rainey's stable, because they have been hitching their mules there, and patched it up, and it looks very ragged at the present time; but on Front street and partly on Sedgwick street is palings; and the rest of it is a board fence.

Q. What about the fruit trees on the lot?

A. Well, there are 70 fruit trees, there, or more.

Q. What kind of repair is the house in?

A. At the present time?

Q. Yes.

A. Very good.

Q. Who lives in the house?

A. My father and my mother, and I also stay with them.

Q. What is their age and the condition of their health?

A. My father is about 67 years of age, and my mother is probably a year younger; I can't give her age exactly, because the records of her age were destroyed by fire.

174 Q. What is the condition of their health?

A. My mother is very feeble; father is just middling.

Q. What would you regard this property as reasonably worth?

A. I value this property at $2,500, at the least.

Q. If you should be driven out of there, out of the property, and compelled to go elsewhere, by reason of the operation of these coke ovens, what would you regard as the damage to you, outside of the actual value of the property, of the loss of the value of the property?

Objected to by counsel for defendant, for the reason that the standard of damages in this case is the depreciation of the property in its market value, and is not determined in any manner indicated by the present question.

Q. I mean yourself and your brother George, as owners of the property.

A. I don't exactly understand your question.

Q. Well, I will withdraw that question for the present. If these coke ovens should be completed and operated on Front street, as appears to be the intention now, what effect would it have upon this property of yours?

A. Well, in my judgment, it would completely destroy this property.

Q. Could it be used as a dwelling at all?

A. Where the house now stands it could not.

Q. You have already stated that you value the property at $2,500. If you and your parents should be driven out of that property, by reason of these coke ovens, and have to seek a place elsewhere, what do you regard would be your damage, additional to the loss of the value of the property?

Counsel for defendant objects to the question, for the reasons above given.

175 A. Well, I would be very sorry to take $500 additional and have my parents moved out of there at the present time.

Q. I ask you to state whether you had an interview with Mr. Rainey, at the time he commenced operations there, in regard to what he was about to do, and the effect it would have on your property, and, if so, just state what was said between you and him on that occasion and who were present.

A. We had an interview with Mr. Rainey, that is, my brother and I had. We met Mr. Rainey at Connellsville, at his office, there, or in the Houston building, I suppose it was his office; and we talked to Mr. Rainey in regard to building the ovens there, and remonstrated with him, and told him it would destroy our property; and asked him to buy our property and he wanted to know how much we wanted for it, and we told him $2,500, and he said he couldn't think of it for a minute.

Q. Did he make you any offer at all?

A. Yes, sir.

Q. State what he offered.

A. He offered a trade in land further back, and would build us a house in place of this one. He didn't state how much land, or anything of the kind, or what the house would be worth.

Q. Did you accept his proposition?

A. No, sir; we didn't accept his proposition.

Q. What else was said or done on that occasion, that you recollect, in regard to the negotiations?

A. There are some other few points that I recollect. I recollect of him saying to me—he asked me what these lots were worth down there, or lots like these, and I just referred him to the lots he had bought from Mr. Cochran—Nos. 7 and 8, and I told him that Mr. Cochran had valued them lots at $500; and I can't tell you just exactly the words he used, but I will tell you as near as I can; he went on to say that if he thought he could get $500 for the lots down there, that he would sell all of that property out in lots at that price.

176 Q. Well, you made no definite arrangement with him at all, on that occasion?

A. No, sir.

Q. Did you make an arrangement for another meeting with him?

A. Yes; Mr. Rainey agreed to meet with us in Dawson on the next evening, I believe.

Q. Did you go down?

A. Yes, sir; my brother and I were there to meet Mr. Rainey, but he didn't come, or we didn't see him; I saw Mr. Mitchell that evening in Dawson.

Q. Has he ever made any overtures to you for an adjustment of the matter since?

A. No, sir.

Q. Have you ever had any conversation with Mr. Rainey, or with any of his employés, there on the premises, since this restraining order and injunction was granted about their violating the order of court, and, if so, what was said?

A. No, sir; I don't think I have talked to any of them.

Q. What valuation did Mr. Rainey put upon these lots, Nos. 7 and 8 on that occasion that you speak of?

A. I heard Mr. Rainey—he was talking, I believe, to my brother at the time, of course, I was in the room when he was talking, and he said he wouldn't take $2,500 for those two lots, because they were in his line of ovens.

Cross-examination by Mr. SHIRAS:

Q. How old were you when your mother bought lots 7 and 8?

A. I was between the age of 10 and 15; something like that.

Q. You say you never saw this plan of lots that has been referred to here by several witnesses?

A. No, sir; I never saw the plan of lots as laid out by the oil company.

177 Q. You, however, have testified that you know of the situation of lots 7 and 8 with reference to this plan; tell us how you know their location.

A. By the stakes set there, and hearing people talk in that community.

Q. That was some 15 or 18 years ago, wasn't it?

A. Yes, sir.

Q. When did Mr. Rainey buy this property, if you remember?

A. I don't know the exact date.

Q. When do you last recollect having seen stakes upon Front street?

A. I don't know the date when I last saw them there; it was quite awhile, though, after my mother had bought these two lots 7 and 8.

Q. You don't intend to swear, then, that you have seen those stakes there since Mr. Rainey bought in 1879?

A. Whereabouts?

Q. On Front street.

A. On these corners?

Q. No; on Front street; not on the corners of the lot, but on Front street—defining the width and length of Front street.

A. No, sir.

Q. When did you buy this property?

A. That we now own?

Q. Yes.

A. In 1885 is when we received the deed; we had made an article of agreement before that, but of course we didn't get the deed until we paid for it.

Q. Did you have your title examined at the time you bought?

A. I don't understand you exactly.

Q. At the time you entered into an agreement to buy the property, or, at the time you got your deed, did you make an examination of the title to these lots, or did you have your attorneys

178 make an examination, or did you buy the property without any examination whatsoever, of the title?

A. We bought this property with the expectation of having a clear title for it, of course.

Q. That is not an answer to my question. At the time you made arrangements to buy, or at the time you arranged to get the deed, did you employ an attorney, or any one representing you, or did you personally make an examination of the title to this property, to see whether you were getting a good title to the same?

A. No, sir; I think not; not to my recollection, I didn't.

Q. You knew that Mr. Rainey was the owner of the surrounding property there, some time before you bought, did you not?

A. I knew that Mr. Rainey had bought this property from the oil company at the time.

Q. Did you at any time, before you bought, examine his deed, to see what he obtained in that grant?

A. No, sir.

Q. Do you know, as a matter of fact, or not, whether in this deed from the Youghiogheny River Oil Company to Mr. Rainey, there

was therein conveyed to him all of the property of the Youghiogheny River Oil Company, including these streets, excepting the four lots—the two owned by Mr. Cochran and the two by yourselves?

A. No, sir; I was never aware of anything of the kind.

Q. You say that the house that you now occupy was flush with Sedgwick and Front streets?

A. Yes, sir.

Q. How do you know that?

A. Why, because the house was built there when the lots were staked off.

Q. How do you know the house was built there at the time these lots were laid out, have you any personal knowledge of that?

A. Yes, sir; I was living with my father when the house was built.

179 Q. And you recollect that it was on the corner of Sedgwick and Front streets?

A. I recollect it by people saying that and seeing these stakes staked off there for these streets and lots.

Q. When was this house built?

A. It was built shortly after it was purchased from the oil company by the Deans.

Q. You were between 12 and 15 years old then?

A. I think I was between 12 and 15 years old then.

Q. Then, you don't know personally, whether this house was built upon the corner of Sedgwick and Front streets, but you get it from hearsay?

A. I knowed those stakes set there, and was under the impression, by hearing other people say so, and seeing stakes there, that they were Front street and Sedgwick street.

Q. You didn't buy this house and lot until some twelve years after it was built, did you?

A. That house that we now own?

Q. Yes.

A. We received our deed in 1885, for this house.

Q. Some twelve years after it was built?

A. Yes, sir.

Q. What was there at that time, when you were of the age you have testified to, that would impress upon you the fact that this house was built exactly upon the corner? How do you know that it was not built back five or ten feet from the corner?

A. By seeing stakes set along this line.

Q. Do you know what the width of that street was?

A. I couldn't say exactly; but from the amount of space that was left there, I would say it was a sixty-foot street.

Q. What is the width of Sedgwick street?

A. I can't say exactly; but I was always under the impression that it was sixty feet.

Q. Then, you don't know the width of Sedgwick street, but you think this house was built on the corner of Sedgwick and Front streets?

180 A. According to the stakes that were set there, this house was built on the corner of Front and Sedgwick streets.

Q. Was Front street ever graded or paved by the Youghiogheny River Oil Company?

A. No, sir.

Q. Or by any one else?

A. No, sir.

Q. When you speak of travel in front of your house, don't you mean the travel that passed to and fro on this township road?

A. No, sir; not exactly; I don't.

Q. What other travel was there that didn't come and go upon this township road?

A. There was often people would come to our house, and still there was a crossing right off of this Front street, at the railroad crossing; went down the township road, and sometimes people would drive down on this street and go down over the road there.

Q. That is where the township road crossed?

A. Yes, sir; where the township road crossed the railroad.

Q. Now, I ask you what travel there was, east and west of your residence, ordinarily, that was not on the township road.

A. I have frequently seen teams and buggies travel on Front street, as I have said, down to the railroad crossing and then cross over the railroad and continue on the township road.

Q. Where did they cross?

A. (Indicating on plan—Exhibit No. 2.) Here is the township road that crosses the railroad here and goes right up on to the street here. There was a crossing here they could drive on off of the township road; you could drive right up to our house off of this street.

Q. You have testified that you believe that Front street extended west of your house a greater or less distance. What travel was there there?

181 A. Well, there wasn't very much travel there. Whenever it was necessary for any one to go there with a team, of course the street was open and they could go.

Q. Wasn't the property around your house all open property, before the erection of these ovens?

A. Yes, sir.

Q. What reason have you for saying that you believe that Front street extends any distance west of your house?

A. What reason have I to believe that it does extend?

Q. You have stated that you believe it extends a considerable distance beyond your house down the river, but you didn't know how far.

A. I don't suppose the street would shut off suddenly at the corner of Sedgwick street; it wouldn't look very reasonable.

Q. And, therefore, you assume that this street was intended to run further than Sedgwick street, at the time this town was projected?

A. That it run further than Sedgwick street?

Q. That is, you assume that?

A. Yes, sir; it is my impressions that the street run clear down to this railroad branch that goes up this ravine.

Q. And the reason for that is, that you don't believe that the street would stop at Sedgwick, but would continue further on?

A. Yes, sir.

Q. How is it you fix the width of Front street, Mr. Herbert?

A. How do I fix the width of it?

Q. Yes.

A. From the corner of these stakes that I have seen there, and the corner of our house, and the township there, and the B. & O. railroad.

Q. Then you assume that the vacant property in front of your house and between the railroad is what was intended to be the width of that street?

182 A. Yes, sir; when we bought this property, that was our impression, that this was the street there.

Q. How do you fix the termination of Front street upon the eastern end?

A. By the line that run between the oil company's property and the old Fayette Company's property.

Q. What line is there there to-day?

A. There is very plainly the mark of the fence that was built there.

A. Along the line of lot No. 8 what is there to indicate a boundary fence?

A. The old fence row; you can see plainly where the fence has been built along there.

Q. Who made that?

A. That fence?

Q. Yes.

A. I am not able to tell you who built that fence.

Q. Do you know whether it was made before or after the purchase of this property by the Youghiogheny River Oil Co.?

A. I think the fence was built before the Youghiogheny River Oil Company purchased the ground.

Q. Then the Youghiogheny River Oil Company did not mark out this boundary line that you speak of? You think it was before they bought?

A. That was always considered in the community there to be the line between that property and the Fayette Coal Company's property.

Q. You say that the ovens are now constructed upon each side of the house. What is the nearest oven to your house, upon the eastern side of the premises?

A. To the house or to the corner of the lot?

Q. To the house.

A. Well, it is fifty feet from the end of the oven that is now partly completed, there is one oven——

Q. Excuse me; I asked the distance from the corner of the residence to the first oven.

183 A. It's about 127 feet, as near as I can tell, from the corner of the house to those ovens.

Q. How near are the end ovens to your house upon the west side?

A. About sixty or sixty-five feet. That is, where they are partly built.

Q. What is the distance?

A. Sixty or sixty-five feet.

Q. Are those ovens completed at the end?

A. No, sir; not at this end they aren't.

Q. Are those ovens upon the private property of Mr. Rainey?

A. Partly so. The front of them is facing on Front street.

Q. That is, provided Front street extends west of your house?

A. I don't see any reason why it shouldn't extend.

Q. I say, assuming that Front street extends west of your house, then a portion of these ovens are on Front street?

A. I don't assume anything about it. I was always under the impression that the street did extend there.

Q. Isn't this the first time that you have offered evidence on that point, with the exception of the evidence offered here last week?

A. I don't clearly understand the question.

Q. I will change the question, then. At the time you made application for a preliminary injunction and supported the same by injunction affidavits, did you therein allege that Front street extended west of Sedgwick street?

A. No, sir; I don't think there was anything said in regard to the length of Front street when we made application for an injunction.

Q. Then, this evidence in regard to Front street extending west of your house has only been supported by the evidence taken before the examiner here and within the past week?

184 A. In regard to this Front street here? (Indicating.)

Q. Did you allege in any of your affidavits that Front street extended west of Sedgwick street?

A. No, sir; I don't think that question was ever asked, that I remember of.

Q. Well, what is your answer? Are you prepared to say whether any evidence was introduced, or any allegation made in court, before the granting of this preliminary injunction, alleging that Front street extended west of Sedgwick street?

A. In our bill for a preliminary injunction, we asked for an injunction to restrain Mr. Rainey from building his ovens on Front street; not in front of the house, but on Front street.

Q. You said that there is a wall for the ovens now built in front of your premises?

A. Yes, sir; there is a wall in front of our house.

Q. Has any work been done upon that since the granting either of the restraining order or the preliminary injunction, in front of your house?

A. Not on this wall; no, sir.

Q. Did you notice any loose stone lying there in front of your house, at any time recently?

A. Yes, sir; there is a pile of stone laying there now; at the present time.

Q. But I refer to stone immediately in front of your house that were there for the purpose of completing these ovens—have they been removed or not?

A. During all their work there since they have been building these ovens, their stone has been unloaded in front of our house, and taken away and used and more unloaded; and also sand and mortar boxes; they mixed mortar there right in front of the door, on Front street.

Q. How much did you pay for this house and lot when you bought it?

A. We paid ten hundred dollars for it.

Q. In what condition was the house when you bought it?

185 A. The house wasn't in good condition when we bought it.

Q. You speak of a number of fruit trees upon the premises. Were there any fruit trees there when you bought it?

A. Yes, sir; there was some there.

Q. How many?

A. I am not prepared to say how many was there when we bought.

Q. Well, about how many?

A. I don't think there was more than twenty-five, I don't say for sure, but I think that's about what there was.

Q. And since that time you have added some fifty trees, have you?

A. Yes, sir.

Q. What did it cost you for the purchase of these trees and the planting of the same?

A. I am not prepared to say exactly what each tree cost.

Q. No; but the total. How much did they cost you in having them set out there?

A. I can't tell you exactly what they cost.

Q. Give us about the amount.

A. Some of them we bought for a dollar, some for two dollars, and some for more; and we bought them at different times; it would be almost impossible for me to give you an account of them; we have some young trees there now on the land.

Q. Did you buy all these trees that are laid out, or did you have any of them given to you?

A. There was no trees given to us that I remember of. People aren't so kind up in that part of the country as to give away fruit trees.

Q. Did you pay $75.00 for those new trees that were laid out?

A. Yes, sir; we did; that or more. They cost us that, or more.

Q. Since you bought in 1885, have you made any improvements and repairs?

A. Yes, sir.

186 Q. You have kept the house, then, in good tenantable repair since the purchase?

A. Yes, sir; we have repaired the house.

Q. When did you make the main improvements on your house?

A. Along last fall a year ago, I believe, was the largest improvements we made on it since we bought it.

Q. At that time Mr. Rainey was erecting ovens upon the adjoining premises, in the near neighborhood, was he not?

A. On the old Fayette coke plant, I believe he had started to build some coke ovens.

Q. What did you pay for these improvements? Give us the total. Not what you value the improvements at—but what you actually paid.

A. The improvements as a whole would cost us between twelve and fifteen hundred dollars.

Q. Upon the house, do you mean?

A. Upon the house, and digging a well, and the work we have done on the property.

Q. I ask you to state what the improvements were upon the house, and the cost of the same, independent of any improvements upon the property, such as a well or trees.

A. Just the house itself?

Q. Yes.

A. Well, I couldn't tell you just exactly, for the reason that we bought the lumber and hired the work done by my brother.

Q. What was the bill for the lumber—just the lumber, as you received it from the seller?

A. Well, I suppose all the lumber that we have used for repairs there——

Q. I mean upon the house.

A. The lumber itself would cost between $300 and $400, at the least figure.

Q. How did you make these payments for the lumber, by check or cash?

A. Why, we paid it whenever we got the money to go and pay it—cash.

187 Q. There were bills rendered for this lumber, were there not?

A. I don't know what you mean.

Q. You say you paid from time to time for this lumber. Was there not a statement, an itemized account of the amount of lumber and the character of the same, furnished you—handed you at the time the lumber was furnished?

A. The lumber dealer that we bought the lumber from—of course there would be bills on his book of what we got and what the price was.

Q. What brother was it did the work on this house?

A. His name is William Herbert.

Q. What did you pay him for this work?

A. I haven't paid him anything yet.

Q. Well, some of this timber was used simply to keep the house in ordinary repair, was it not?

A. The timber was used for repairing the house generally, wherever it was needed.

Q. This lumber, then, was used in the renewal of portions of the house that were gradually wearing out since the time you bought it?

A. We have weather-boarded the whole house completely, put on a roof, put in new windows and new glass, new door, and repaired the house wherever it was needed.

Q. Now, you have shown about $300 or $400 for this lumber and material of that kind. What other improvements were there made upon the house? What other improvements or outlays were there in fixing up the house?

A. I don't know exactly what you mean by that question.

Q. I say what other improvements were there made upon that house to necessitate an outlay of any further money?

A. Well, we have given the house one coat of paint.

Q. What did that cost?

A. Well, I don't know exactly; I am not prepared to give you the exact amount it cost.

Q. Did it cost $15?

188 A. I can't say exactly what it did cost.

Q. You have testified that this house was purchased by you for $1,000; now you value it at least $2,500. How do you account for this advance of 150 per cent. in value since the time you bought it?

A. I account for it by the improvements that are made on the property, and the location of the property.

Q. How has it improved in its location since the time you bought?

A. Because it is a very handy place to live there; it is on the front part of the property.

Q. Hasn't it always been there?

A. Yes, sir.

Q. On the other hand, has the proximity of these ovens enhanced or decreased the value of the property, independent of their location upon Front street?

Mr. GARRISON: To what ovens do you refer? To those on Front street?

Mr. SHIRAS: I say independent of the ovens on Front street.

A. Do you mean all the ovens in the old Fayette plant?

Q. Yes.

A. If the coke ovens weren't built closer than the old Fayette ovens were built, it would increase the value of the property.

Q. But suppose them to be built in that immediate neighborhood, but not on what you allege to be Front street, but within 300 or 400 feet, would that enhance or decrease the value of the property?

A. Well, I think that would greatly decrease the value of the property.

Q. Isn't that a possibility, in the near future?

189 A. I don't understand you exactly.

Q. Even if not built upon any of these streets, would that increase or decrease the value of the property?

A. If coke ovens were built within three or four hundred feet of any property or dwelling-house, it would injure it.

Q. Is not this property gradually being built up with coke ovens in that locality—the surrounding property?

A. There has been coke ovens in that community, or in that neighborhood, for quite a number of years, but not just close to this property.

Q. What is there to prevent the erection of coke ovens in the immediate vicinity of your house, and not upon these streets?

A. I don't hardly know how to answer that question. I suppose Mr. Rainey thought if he could go across the township road and these streets, he could build coke ovens.

Q. What I wish to get at, Mr. Herbert, is, for you to show how this house and lot have increased 150 per cent. in value since you bought some five years ago or six; and you have stated that the improvement has added to the value of this site. Now, I ask you to state, in your own way, how there has been any such rapid advance in the value as that, by reason of improvements in the neighborhood. State what you mean by that.

A. I mean that our property that we now own—we have repaired this property, and the location of this property is good.

Q. Can you, as a matter of fact, show either receipted bills, for the payment of the money, or payment by check, for an amount of money equalling or exceeding $500, within the past three years, upon this property?

A. If the bills are not all destroyed, I could, most assuredly; more, too.

Q. Well, I have asked you on cross-examination here to give your estimates as to the extent of these improvements, and so far you have failed to show any expenditures exceeding some $400.
190 Now, if your cross-examination does not indicate fully the extent of these expenditures, I wish you would state, briefly, how and in what way it exceeds the amount of $400.

A. I said the lumber that we had bought to improve this property would cost between three and four hundred dollars, without any work on this lumber, or other repairs on the place that we have done.

Q. When you speak of there being six rooms in your house, do you include any portion of the cellar in that estimate?

A. Yes, sir; including the basement story.

Q. And how is it used?

A. It is used in a general way; they use it for a wash-room, and whatever it is needed for.

Q. Is that a perfectly dry basement?

A. Yes, sir, it is dry; there is no water standing in it at all.

Q. Do you ever use it in the way of a sleeping apartment at all?

A. No, sir; we have never had any occasion to use it to sleep in.

Q. It is used, then, in the customary and ordinary way that cellars are used?

A. Yes; we use it to keep our goods in and use it for a wash-room. There is a partition in the basement.

Q. Can you enter this house upon Front street, without going through the cellar?

A. No, sir.

Q. Then, your main entrance, as a matter of fact, is upon Sedgwick street—your customary and usual way of entering your house?

A. Yes, sir; we get in through the kitchen that way.

Q. What is the depth of this property of yours?

A. That is, from Front street back to Second street?

Q. Yes.

A. That's about 200 feet.

191 Q. And you say that this property would be entirely destroyed in case coke ovens were built along in front of what you call Front street?

A. It would be entirely destroyed for our use.

Q. Then, when you testify that it would be destroyed, in your estimation, you mean as a residence for yourself and your family?

A. I mean as a residence, as a dwelling-house, for ourselves or any one else.

Q. Do you mean to say that these lots would have no market value whatever?

A. They would have no market value as a dwelling.

Q. Couldn't a storehouse or a residence be built upon the rear end of these premises?

A. They could be built there, but it wouldn't be a desirable place to live; there is nobody would live in it as a dwelling-house.

Q. How far away would they be from those ovens were they built upon the rear end of the lot, or fronting on what you call Second street?

A. If they were built flush with the street at the rear end, I suppose they would be about 175 feet away; something like that—owing to the size of the houses.

Q. Don't you know of plenty of dwelling-houses in the coke regions that are built within 200 feet of coke ovens, and occupied regularly from year to year?

A. I know of houses that are built pretty close to coke ovens.

Q. Within 200 feet?

A. I can't say whether within 200 feet, or not; I never measured the distance.

Q. Have you been at Tyrone and Broadford?

A. Yes, sir; I have been past there.

Q. Well, haven't you noticed houses there within 200 feet of coke ovens?

A. Yes; I have noticed these houses there, but I would have to measure the distance before I could tell exactly what it was.

192 Q. Where do you work?

A. I work at the Jackson mines.

Q. Who is the owner and general manager of that mine?

A. Its is called the Jackson's Mines Company. I think Mr. Ewing of Uniontown and Mr. Cochran are the owners.

Q. Don't you know of houses built there and occupied that are within 200 feet of the coke ovens?

A. Yes, sir; there are houses there that are pretty close; I don't know whether they are within 200 feet or not; I never measured.

R. If such be the case, what would prevent such houses being built on the rear end of these lots of yours, and occupied for such purposes?

A. Because there is quite a difference between the location of this land and where these other houses are built. These houses at Jackson's mines are built next the river, and the coke ovens are set in next the hillside; as a general thing the smoke would draw up over the hill. In our lots the smoke would draw right back towards the house if coke ovens were built between that and the river.

Q. Have you ever been at Jimtown?

A. Yes, sir; I have.

Q. Do you know of stores and dwellings there within 200 feet of coke ovens?

A. No, sir; there is no store at Jimtown within 200 feet of coke ovens.

Q. Well, how about the dwellings?

A. I don't know whether they are within 200 feet or not; they are very close, though.

Q. So that you find that in the neighborhood of coke works there are a number of houses that may be built within some 200 feet and occupied as residences?

A. There is but very few, to my knowledge.

Q. What visible evidence is there to-day to indicate the existence of this alleged town of Sedgwick, and the various streets and lots?

193 A. Well, if a person was to come up there and look at those strings of coke ovens built on the street, I don't suppose they would think there was a town there.

Q. Before the location of these coke ovens, within the last 4 or 5 years, what visible evidence was there there upon the ground to indicate the existence of this alleged town, and the streets and the width and the length of the same, and the length and width of the lots?

A. The house was built there on the corner of Front and Sedgwick streets, Front street running in front, and Sedgwick street running back.

Q. Then, your answer is, as I understand it, because your house is there with s reets upon either side. Is that your answer?

A. That would be evidence; yes, sir.

Q. What is there there to indicate the width of these streets to-day, or what has there been within the last three or four years?

A. Those stakes that were put there are all taken away now.

Q. Has there been anything within the past five or six years to indicate the width of those streets?

A. On Front street this vacancy that was left there between the township road and the corner of these lots.

Q. Isn't it vacant all around your house, and hasn't it been for a number of years?

A. Yes, sir.

Q. What is there there to-day to indicate the length of these streets?

A. Why, the land as it lays itself.

Q. What was there there in 1879, when Mr. Rainey bought, that would indicate the existence of these streets and lots, upon the ground itself?

A. There was nothing more than I have already stated.

Q. This one house?

A. This one house, and the town lots.

194 Q. When you bought this house in 1885, didn't you know that Mr. Rainey had bought all the property around and about the premises, excepting lots 7 and 8, and that that purchase included all of these alleged streets?

A. I was aware when Mr. Rainey bought this land from the oil company that he had purchased the land, but I was not aware that he had purchased the streets.

Q. Did you look at his deed to see what he had bought?

A. No, sir.

Q. Then, as I understand you, you bought your property some six years later, without being aware of the fact that Mr. Rainey's deed did include within the boundaries of the same these particular streets?

A. When we bought this property we were under the impression that we were entitled to these streets as laid out in the plan of the town.

Q. You knew that the Youghiogheny River Oil Company had parted with all its title to that property at that time?

A. I had heard of Mr. Rainey buying this property from the oil company.

Q. Then you are not prepared to say whether or not this deed of Mr. Rainey's was examined by yourself or by your attorneys at the time you bought?

A. No, sir; I am not prepared to say.

Q. Have you had any consultation with Mr. Cochran in regard to this controversy?

Objected to by counsel for plaintiffs as not proper cross-examination.

A. Not directly. I will state to you all the talk I had with Mr. Cochran on this subject. When I started the case I went to Mr. Cochran, because we had purchased from him, and I told him it looked as if we were going to have our home destroyed; and I told him I had thought of taking steps to try and prevent it.

195 Q. Well, did he advise you to begin legal proceedings?

A. He didn't advise me one way or another.

Q. What did he say when you told him that you thought of bringing legal proceedings?

Objected to by counsel for plaintiffs as not proper cross-examination and as irrelevant and incompetent.

Q. What did you go to him for, if you didn't go to consult with him and be advised by him?

A. He had a deed in his possession that I wanted to see.

Q. But you also told him at that time that you thought about beginning legal proceedings, did you?

A. I told Mr. Cochran that it looked as if we would have our home destroyed, and we would try to stop it if we could.

Q. Didn't he advise you to defend yourself in that way?

A. I don't remember exactly what he said in regard to that; I can't say.

Q. Did you then, or thereafter, make any agreement or arrangement with Mr. Cochran, in any way affecting your control over this property or the sale of the same?

Counsel for plaintiff- renews his objection.

A. At this time?

Q. Then or thereafter.

A. No, sir; I made no agreement with Mr. Cochran. When we purchased this property in the first place, it was the understanding between my brother here and myself that we would give this property to my father and mother——

Q. That is not an answer to the question. The question is, whether you, either at the time you bought the property or at the time you had this consultation with Mr. Cochran referred to by you, have entered into an agreement or arrangement in any way affecting your control of this property?

A. No, sir.

196 Q. Has he advised you not to sell to Mr. Rainey?

A. No, sir.

Q. Or made any suggestions to that end?

A. No, sir.

Counsel for plaintiffs states that he does not desire to be captious, but if these questions be carried much farther he will instruct the witness not to answer, as the questions are irrelevant and are certainly not proper cross-examination.

Q. You work for Mr. Cochran, do you not?

A. I work for the Jackson Mines Company.

Redirect examination by Mr. GARRISON:

Q. You said in your cross-examination that last fall a year ago, when you put the most of the improvements on this property, that Mr. Rainey had ovens in that vicinity. How far away were those ovens from you, the nearest of them?

A. It would be hard for me to tell the exact distance. They were on the old Fayette coke plant, where there had been coke ovens built at one time.

Q. Give your best judgment as to what you think it is; how many hundred feet?

A. From our residence?
Q. Yes.
A. Well, I suppose it is 1,000 feet, anyway, as near as I can tell; maybe more.

Hearing adjourned to meet on Tuesday, December 22, 1891, at 11 o'clock a. m.

And now, to wit, Tuesday, December 22, 1891, parties met, pursuant to adjournment, at the hour of 11 a. m.

197 Present: J. M. Garrison, Esq., and Hon. Edward Campbell, counsel for plaintiffs, and George Shiras, 3d, Esq., of counsel for defendant.

Solomon Baker, a witness on behalf of the plaintiffs, being duly affirmed, testifies as follows:

Direct examination by Mr. Garrison:

Q. What is your age?
A. Well, if I live till Christmas I will be 54.
Q. Where do you live?
A. I live in lower Tyrone township, Fayette county.
Q. How far do you live from this Herbert property in dispute?
A. Well, I suppose, not over 250 or 300 yards, at the outside.
Q. How long have you lived there?
A. I have lived at the present place six years; that is, where I am living now.
Q. Where did you live prior to that?
A. I lived on what is known as the Fayette coal property, in one of the Fayette houses.
Q. How long did you live there?
A. I lived there from November 3, 1863, until six years ago last spring.
Q. Where did you live prior to 1863?
A. Prior to 1863, my family was at Dunbar.
Q. How far is it from this property?
A. Well, the town of Dunbar is probably, by railroad, it might be seven or eight miles.
Q. Mr. Baker, how long have you known the land on which this Herbert house is situated?
A. Well, sir, I have known the land on which this Herbert property is situated since 1849 and '50.
Q. Do you recollect when the Youghiogheny River Oil Company purchased there? That is, do you recollect the fact? I don't ask you to give the exact date.

198 A. Do I recollect the fact?
Q. Do you recollect of their purchasing there?
A. I do; but I can't give the date.
Q. Of whom did they purchase, do you recollect?
A. No, sir; I believe, if I am not mistaken, though, that the property belonged to George McCormick of Connellsville.

Q. After the Youghiogheny River Oil Company purchased there, state what they did with reference to the property.

A. Well, I believe, after they bought there, if my memory serves me right, they laid out the property in a town.

Q. What town?

A. It was known then as the town of Sedgwick.

Q. Where were you living at that time?

A. I was living on the Fayette county coal property.

Q. How far away from this property?

A. Probably 100 or 150 yards.

Q. What streets were there laid out there in that plan?

A. Well, I don't know——

Q. Mention some of them that you recollect.

A. Well, Front street and Sedgwick street, I remember those two.

Q. Do you recollect a street called Second street?

A. Yes, sir; that lay directly back of Front street.

Q. How were these streets and lots laid of-; I mean, how were they indicated—by stakes on the ground?

A. By stakes on the ground.

Q. Did you see those stakes?

A. I did.

Q. Who was in charge there for the oil company, at that time?

A. A man by the name of William Jones.

Q. Do you know of his selling off lots there, or offering the lots for sale in that plan?

A. I do.

Q. Do you recollect to whom?

199 A. He wanted to sell me two lots.

Q. Where were those lots located, if you recollect?

A. I had my preference, if I wanted to buy; lots either on the lower end or upper piece; I mean by the lower end, down the river towards Dawson.

Q. Where did Front street begin? I mean on the lower end.

A. Front street on the lower end, if my memory serves me right, began at a little ravine right next to the Winter's Run branch.

Q. Where did it terminate, if you know? At the other end?

A. At the line between the Fayette Coal Company and the Youghiogheny River Oil Company.

Q. Describe Sedgwick street, with reference to Front street, where did it begin and where did it end?

A. It began at the railroad and terminated at the extreme part of the property.

Q. At the end of the oil company's property?

A. Yes, sir; at the north side.

Q. What angle did it make with Front street? Was it at right angles?

A. It was directly back; I don't know the exact angle.

Q. About what was the width of those streets, or what was the width of those streets, if you recollect?

A. Well, I never measured them, but I suppose they were 60 feet.

Q. Do you recollect when the Herbert house was built there? I

don't mean do you recollect the date, but do you recollect of its being built there, and the process of construction going on?

A. Yes, sir; I remember that.

Q. Where was that house built with reference to Front street and Sedgwick street?

A. It was built right on the corner of Front and Sedgwick streets.

Q. Who built it, do you recollect?

200 A. Why, it was a man by the name of Dean started to build it.

Q. Were those pins, indicating the streets, there on the ground at the time?

A. Yes, sir; they were.

Q. I ask you to state whether this town of Sedgwick and those streets that you have named were a matter of common repute in that neighborhood.

A. It was generally known as a new town; it was common repute among the people in the neighborhood there.

Q. Frequently spoke of?

A. Frequently spoken of; yes, sir; as a new town.

Q. Have you observed, recently, the improvements on this Herbert land, the housse, buildings and other improvements?

A. Yes, sir; I have.

Q. Are you acquainted with the value of real estate in that vicinity, such as this?

A. Why, I believe I've got some slight acqua-nta?nce.

Q. How have you acquired that knowledge?

A. From property being sold in Dawson and vicinity.

Q. How would it compare in value with such property in the town of Dawson?

A. Well, I believe, it would compare equally good; just the locality and place.

Q. From your knowledge of values there, what would — regard this property as reasonably worth in the market, if these coke ovens, that are about to be constructed there, were not constructed?

A. Well, I believe I gave a decision on that. I would value it at $2,000; that is what I affirmed and believe, taking the improvements and everything.

Q. You have observed recently the coke ovens that are const-ucted there near this property?

A. Yes, sir; my place of business is right there, and I see it every day.

201 Q. Just describe those ovens, as briefly as you can, that are constructed there now. Describe the ovens at the lower end of the line.

A. Well the ovens on the lower end of the line——

Q. There's a double row of ovens on the lower end?

A. There's a double row on the lower end.

Q. And how at the upper end?

A. A single row on that end.

Q. How is the condition immediately in front of this Herbert property.

A. The condition immediately in front of the Herbert property is piled up stone, only just a little space to get along, probably four feet high.

Q. Is there any work being done toward the construction of ovens immediately in front of the property?

A. Nothing now; there was a base wall put up right in front of the property.

Q. If that opening is closed up there immediately in front of the Herbert property, so as to continue those ovens through there, what effect would it have on this house?

A. It would render it impossible to get to the house by that way.

Q. Would it not be necessary to remove a portion of the house?

A. Yes, sir; I believe it would be necessary to remove about four feet of the house, to get the larry track along.

Q. What would be the effect on this Herbert property, if those ovens should be completed, close up, completed there and operated, as the appearance now indicates, in front of this Herbert property?

A. Well, sir; I wouldn't take it as a gift; it would ruin the property.

Q. What would be the effect on the value of this property if those ovens should be operated, as they are now constructed, without closing up this opening in front of the Herbert house?

202 A. Well, the effect on the property, if I understand the question, it would be untenantable; a man couldn't live in it.

Q. How would it affect the value of the property in the market?

A. As I stated before, it would effect the value of the property; a man couldn't live in it, and consequently it wouldn't be worth anything.

Q. Why couldn't he live in it?

A. On account of the soot and smoke.

Q. In what direction does the wind usually blow there, with reference to that house?

A. Our wind there is a west wind.

Q. And how would that carry the smoke?

A. Right on the house, off the double block.

Q. Mr. Baker, how has this Front street in front of the Herbert house been used since you knew it? As a highway?

A. Yes, sir; it was used as a highway. There was a road running right along Front street up and intersects the Fayette coal property.

Q. How is it used with reference to the Herbert house, with reference to getting in and out of the Herbert property?

A. Front street now?

Q. Yes; how has it been used ever since you knew it, as a means of ingress and egress to that property—has it been used for that purpose?

A. For the purpose of getting in and out?

Q. Yes.

A. Yes, sir; it has. That's the way they go in and out.

Q. How about Sedgwick street, has it been used in the same way for the purposes of that property?

A. Yes, sir; it has. I believe they have their coal house right along the property on Sedgwick street; come right down off the street to the coal-house and to the house, too.

Exhibit No. 2 shown witness.

203 Q. Mr. Baker, I ask you to look at this drawing or plan before you, and state whether or not that represents the location there of Front street, Sedgwick street, the railroad, the Herbert house, etc.?

A. Yes, sir; I consider that a good representation.

Cross-examination by Mr. SHIRAS:

Q. What is your business, Mr. Barker?

A. At the present time?

Q. Yes.

A. Fire inspector for the B. & O. railroad.

Q. What was your business before that?

A. My business before that was that of a miner; mining in coal mines.

Q. You have testified that this property is worth $2,000, and that it compares favorably with and is similar to the property in Dawson. What is the size of Dawson?

A. Well, I couldn't tell you that.

Q. I mean in number of inhabitants?

A. That's a question I can't answer.

Q. Give in a general way your own judgment, without intending it to be absolute.

A. Well, I can't tell you.

Q. Is it in the neighborhood of a thousand inhabitants?

A. I suppose probably, it is.

Q. Are the streets graded in that town?

A. They are partially, I believe.

Q. Has it sidewalks?

A. Partially.

Q. In this alleged town of Sedgwick how many houses are there?

A. In this alleged town of Sedgwick now, I believe, there's only about four houses in the town now.

Q. Will you show on the plan where there are four houses?

A. It isn't on here; but the Herbert property is there (indicating)——

204 Q. I mean, are there four houses upon the site, as shown by that particular plan?

A. No, sir; I can show you where they are located.

Q. How many houses have been built upon the lots sold by this oil company, that you know of?

A. Well, as you have not got this here, I am satisfied in my mind that there's three houses.

Q. That is not my question. How many houses have been built upon these lots sold by the Youghiogheny River Oil Company? I mean since the lots were sold; not any old houses that were there before.

A. Since the town was laid out?
Q. Yes.
A. One.
Q. When was it that Mr. Jones offered to sell you these lots; what year?
A. Well, it was betwixt '72 and '73, some time. I didn't charge my memory with the dates.
Q. When was it they apparently gave up this project?
A. Well, I have never learned that they did give it up; never heard that it was given up.
Q. When did you last hear of any lots sold by the Youghiogheny River Oil Company, as building lots?
A. I don't remember; can't give the dates.
Q. Don't you know that the last lot sold was about 1873?
A. I don't know that because I didn't charge my memory.
Q. Then if you are not prepared to say when these lots were sold and when this project was dropped, how is it you are able to testify as to the length and width of these streets? Why do you remember such facts as these?
A. By the pegs and seeing the survey of the town.
Q. Do you mean to say that you can recollect whether those streets were 40 or 50 feet in width, on representation made some 20 years ago?
A. No, sir; I don't mean to say that.
Q. Well, how do you know the width of Front street?
205 A. From the agent; he told me that was the width of the street; Mr. Jones.
Q. And you remember that, although it was made twenty years ago?
A. Sir?
Q. And you remember that, although it was made twenty years ago?
A. Yes, sir.
Q. Do you recollect how many of these lots were sold by the Youghiogheny River Oil Company?
A. I believe there were three lots sold.
Q. About how many lots did they have?
A. I don't know.
Q. What visible evidence is there there on the ground to-day, to indicate the length and width of these streets and the number of lots?
A. I don't know that there is anything, with the exception of the line—that is, to indicate the length and width.
Q. What line do you refer to?
A. The line between the oil company and the Fayette company.
Q. How does that indicate the existence of a town, the mere division line between two tracts of land?
A. At the time it was laid out, it was indicated by streets.
Q. But I say to-day, and in the immediate past, what is there there to indicate the length and width of these streets, or that any such town was projected?

A. I think my head is a little too thick to understand you.

Q. What is there there upon the ground to-day, which would indicate to an observer upon the premises, the existence of these various streets you speak of, and of the lots? Were the streets graded?

A. No, the streets are not graded. I believe Mr. Rainey has graded Front street.

Q. You say you saw these stakes about 1873?

A. I think betwixt '72 and '3.

206 Q. When did you last see those stakes there?

A. Well, I don't remember; can't state when I last seen them.

Q. Isn't the land about the Herbert house open in its character, on all sides?

A. Well, no, I wouldn't think it was now, at the present time.

Q. Well, independent of these ovens, what was the character of the property surrounding the house? Wasn't it open?

A. Why, it was open prior to the building of those ovens.

Q. What is the width of those lots?

A. That's a question I can't answer; I never measured them.

Q. What is the depth?

A. That's another question I can't answer; never measured them.

Q. What is the width of Sedgwick street?

A. That's another question I can't answer.

Q. When you say you wouldn't take this property as a gift, in case those ovens were operated, do you mean to say by that that this tract of land, 100 feet in front, say, and 200 feet in depth, is absolutely worthless?

A. I would say it was, if the ovens are operated as built. I wouldn't have it any way; wouldn't pay the taxes on it.

Q. Isn't it possible to erect either warehouses or dwellings upon the rear end of this lot?

A. Well, it would be possible, either to erect warehouses or dwellings for Hungarians, or some people of that kind; but it wouldn't be possible for what I consider white people to live in.

Q. Don't you know of any instances in which the employés of these various coke plants reside with their families continuously in residences within 200 feet of the coke ovens, in this region?

A. No; I don't.

207 Q. Are you acquainted with the Jackson mines?

A. Yes, sir.

Q. And the location of the houses there?

A. At Jackson. Yes.

Q. Do you mean to say that there are no houses there for employés and others, built within 200 feet of the ovens?

A. Well, I can't say whether they are built within 200 or 300 feet.

Q. Are you prepared to say that they are not within 200 feet?

A. No, sir; I won't be qualified to anything I don't know.

Q. Well, the workers at the mines aren't all Hungarians, are they?

A. No, sir; there's none there.
Q. Are you acquainted with the Tyrone works?
A. Yes, sir.
Q. Do you know the location of the dwelling-houses there?
A. Yes, sir.
Q. Do you know whether or not they are within 200 feet of the coke ovens?
A. I don't know the distance; wouldn't be qualified to anything I don't know.
Q. If, then, it should be shown that at Tyrone and Jackson and other localities wherein these coking plants are established, dwelling-houses are built and occupied by persons within 200 feet of coke ovens, would you still adhere to your statement that this land is absolutely worthless?
A. Yes, sir; I would.
Q. Have you ever bought or sold property in the immediate vicinity of this Herbert lot?
A. I have never sold; I have bought.
Q. Where was this property?
A. It is about two or three hundred yards from the Herbert property.
208 Q. When you say that the town of Sedgwick was generally known, do you mean by that to say that such a town had actually been built, or that the talk was in reference to the project at that time of laying out a town?
A. I mean it was actually laid out at that time. It hadn't been built, but it was actually laid out in town lots.
Q. And this talk was at that particular time that you refer to?
A. No, sir; not just at *at* that time, but afterwards.
Q. How long afterwards?
A. I can't just tell you; it might have been a year, it might have been two years; I can't say.
Q. This travel in front of the Herbert house that you speak of was confined, or was largely upon the tow*h*ship road, was it not?

GEORGE W. HERBERT recalled on behalf of plaintiffs.

Direct examination by Mr. GARRISON:

Q. You are familiar with the manufacture of coke up in that region, are you?
A. Yes, sir.
Q. What would be the effect on the value of this property of yours and your brother's, if those ovens should be operated there as they are now constructed in Front street?
A. What, it would be perfectly worthless, for sale.
Q. What would?
A. The property, because it would kill all the fruit, and everything like that.
Q. What is the direction of the wind there, with reference to this house and the ovens, the prevailing wind?
A. Off the ovens below would put it right onto our house.

Q. I ask you to state whether this town of Sedgwick with this Front street and Sedgwick street, have been there in the neighborhood matter of repute in the community?

A. It has.

209 Cross-examination by Mr. SHIRAS:

Q. You say that the operation of these coke ovens would make the property perfectly worthless, so far as the sale is concerned?

A. Yes, sir.

Q. How do you know that?

A. Why, do you suppose anybody would want to buy any property between two sets of coke ovens for a dwelling or residence?

Q. Suppose you were offered $1,000 for it, notwithstanding the existence of those coke ovens, would you be prepared to say it was of no value?

A. I don't know who would offer it; Mr. Rainey might want it.

Q. Do you mean to say that this tract of land, 100 feet in front and 200 feet in depth, is of no value on the market, for any purpose whatsoever?

A. I do; as a residence; or anything like that.

Q. Couldn't warehouses or dwellings be built upon the rear end of this lot?

A. They could.

Q. And couldn't they be occupied then, as they are in these other coking regions?

A. They might by a certain class of people, the same as do occupy those houses there. There is not one American citizen out of every 50 in the coke regions that lives within 200 feet of those ovens.

Q. How is it at the Jackson mines?

A. I never measured. At Jackson there might be one very close, but there is a difference in the wind there. The ovens are next the river, and the smoke hardly ever effects them, unless it's in a rain when the air is heavy and the smoke will come down. Of course there might be dwellings and warehouses built on that property that might be valuable to some one, but it wouldn't be to us as a residence.

210 Q. You have testified that this town of Sedgwick was a matter of repute there. What can you recall to in any way indicate that the Youghiogheny River Oil Company, during the year 1874, or thereafter, had intended carrying out such a project?

A. I had nothing more than what I told you in evidence.

Q. That is not the question.

(The examiner repeats the question.)

A. Why, I suppose they intended to carry it out, or they would have never started it, would they?

Q. That is not an answer. It appears in evidence, on your part and on the part of your brother and other witnesses, that a man named Jones, was the agent of this company, and showed a certain

plot and offered to sell certain lots, and it is alleged that some three or four of those lots were sold along about 1873. Now, my question is, what can you recollect to indicate that during the year 1874, or thereafter, there was anything done on the part of the Youghiogheny River Oil Company, that would indicate that they intended carrying out this project any further?

A. I never seen anything contrary to what I always knowed.

With the understanding that the deeds and other exhibits on behalf of plaintiffs are to be offered in evidence before the court, the plaintiffs rest.

Hearing adjourned to meet on Tuesday, January 5, 1892, at 11 o'clock a. m.

211 Tuesday, January 5, 1892.—By consent of counsel, hearing continued until a date to be fixed.

And now, to wit, Friday, January 15, 1892, by agreement as to date, parties in interest met at the office of J. M. Garrison, Esq., at the hour of 2 p. m., and the taking of testimony on behalf of the defendant in this case was commenced.

Present: J. M. Garrison, Esq., of counsel for plaintiffs, and Messrs. C. C. Dickey and Geo. Shiras, 3d, of counsel for defendant.

J. G. OGLEVEE, being duly sworn on behalf of defendant, testifies as follows:

Direct examination by Mr. DICKEY:

Q. Where do you reside?
A. At East Liberty, Fayette county.
Q. What township?
A. Dunbar township.
Q. How long have you resided there?
A. I have resided there for twenty years.
Q. Do you know the property of the Messrs. Herbert, the plaintiffs in this case?
A. Yes, sir.
Q. How long have you known that property?
A. Oh, I have known that property twenty years or more.
Q. How far is your residence from that property?
A. As near as I can judge, a mile or a mile and a half, the way we go, about.
Q. What is your occupation?
A. I follow merchandising.
Q. How long have you followed the business of merchandising?
A. Since 1860.

212 Q. Have you, during that time, engaged in any other occupation?

A. I have been engaged in the building business the last few years, to a certain extent, in a small way.
Q. Are you now so engaged?
A. Yes, sir.

Q. What class of houses have you been building?

A. Rather a cheap class of houses; that is, wooden houses of about $900 to $1,500 in cost.

Q. For about how long have you been so engaged?

A. Five or six years; longer than that in a small way.

Q. How would the class of houses which you have been engaged in erecting compare with the Messrs. Herbert's house?

A. Well, the Herbert house is a larger house than many that I have been building; larger than many, but not as large as others.

Q. I wish you would state whether, from 1875 to 1880, you were familiar with the Herbert property, and the locality generally.

A. Yes, sir; I have been; I was about it frequently.

Q. State whether during those years you visited the neighborhood frequently, and what occasioned your visits there.

A. We used to sell goods to the miners on that side of the river—that is, on the opposite side of the river; we had considerable trade on that side of the river, and I would be there among the customers, taking orders and collecting bills, and so on.

Q. Were you there frequently?

A. I was there frequently; yes, sir.

Q. Will you state whether during the five years from 1875 to 1880, or any other time, you ever heard of any town of Sedgwick?

A. I never did; I never heard of it.

213 Q. Well, during the time you were making your visits there, as you have testified, had you an opportunity of finding out whether any town was laid out there—could you see?

A. Well, there couldn't have been very much show of a town, I think, or I would have noticed it, or known something of it. I think I would. I possibly, now, might have heard something said in regard to laying out a town there, or laying off some lots there; if I ever did, I have forgotten all about it, though, and I don't think there was very much stir made about it.

Q. Did you ever see any indication of any town marked upon the ground?

A. I never did.

Q. Did you ever see any pins or posts, or monuments of any kind?

A. Nothing of the kind.

Q. Did you ever see any streets laid out?

Counsel for plaintiffs suggests that the witness should be asked what he saw, and not asked such leading questions.

A. I never did; no, sir.

Q. Are you acquainted with the value of real estate in the vicinity of the Herbert property?

A. Well, I am not as well acquainted with the value of property on that side of the river as I would be on our side of the river, never having any dealings in any land or property on that side of the river.

Q. How close to the Herbert property have you had any dealings in real estate?

A. None closer than our own village, to the best of my recollection now.

Q. Do you know whether the property in the neighborhood of the Herbert property would be any more or less valuable than that in your own neighborhood?

A. I would judge it would be of less value than it would be in our own neighborhood.

214 Q. From the knowledge that you have of property in your own neighborhood and of the Herbert property, are you able to state what the value of the Herbert property would be?

A. Do I understand you want to know the value of the property as it stands—house and lot?

Q. Give us first as it stands, if you can—first say whether you know the value. I ask you first whether you are able to give the value of the whole thing, as it stands?

A. I might put a value on it; I mightn't come close to the figure that others would put on it; of course I can put an estimate on the value of it.

Q. You speak of having dealt in real estate in your own vicinity. I ask you whether you have bought and sold lots in that vicinity?

A. I have; yes, sir.

Q. Well, now, state what, in your judgment, the Herbert property is worth as a whole, house and lots.

Objected to by counsel for plaintiffs, for the reason that the witness does not show by his testimony that he is capable of forming a reliable judgment as to the value of the property in question.

A. Do you wish to know what value I would place upon the property as it stands?

Q. Yes.

A. Well, from ten to twelve hundred dollars, I would think, would be rather a high figure, or it would be as high as could be gotten for it at any time.

Q. Have you made an estimate of what the house would cost to build?

A. I made an estimate of a house of about that size, and corresponding.

Q. What did you estimate the cost of that house to be, to build?

215 Objected to by counsel for plaintiffs, because the witness has not stated that he had the means of ascertaining its probable cost.

Question withdrawn for the present.

Q. Have you examined the house, with reference to ascertain the probable cost?

A. I looked at the house from the outside.

Q. Did you make any measurements?

A. I made no measurements; no, sir. If you will allow me to explain——

Q. Explain anything you want.

A. The gentleman that was with me gave me the dimensions of

the house; told me he knew the size and gave me the dimensions of the house, the outside measurements; and from that I made my estimate of the cost of a building of that kind.

Q. Who was the gentleman that was with you?

A. Mr. Skelly.

Q. Why didn't you go inside, and make an *an* examination inside?

A. The lady of the house refused us admittance.

Q. Did you tell her what your business was there?

A. I think Mr. Skelly asked whether he could look at the house inside; I don't remember exactly. I don't remember exactly, but I think that's about what he asked; and she said no.

Counsel for plaintiffs objects to the answer, as incompetent and irrelevant, and that it should not be allowed to affect the rights of the plaintiffs, who it is not alleged had anything to do with such refusal.

Q. Now, give us your estimate of the cost of such a house as that.

216 Counsel for plaintiffs objects to the witness answering that question, for the reason that he has not given a basis upon which he could intelligently make an estimae as to the value of the property, or its cost.

A. The summing up of my estimates was $797.00.

Q. Have you got the estimate with you?

A. Yes, sir.

(Witness produces and hands to counsel a paper.)

Q. In your estimate of $797, what kind of a house would be included?

A. A frame building, set on a stone foundation—a frame building 16 by 32; sixteen-foot studding for the main house, forming four rooms, and an extension or wing, 16 by 18 feet; no cellar underneath that part; this extension is one story high; covered with No. 1 18-inch pine shingles, sided up with pine siding—the milled pine siding of the kind commonly used in the neighborhood; plastered throughout with a three-coat job of plastering. I made no estimate for cupboards and presses inside; I was told there are none in this house. I made an estimate of two chimneys in the main part, three fire-places and mantles complete; in the kitchen a brick flue for a stove flue. I don't remember the whole of it; without looking at the paper. There was to be one coat of paint, or priming, rather, we call it priming; a coat of oil and ochre; that would include one coat of oil and ochre for the painting.

Paper marked "Defendant's Exhibit A, Jan'y 15, 1892," shown witness.

Q. Is this you estimate?

A. Yes, sir.

Q. The estimate you made included studding?

A. Yes, sir; regular frame.

217 Q. Suppose the house didn't have studding to it, would it make any difference in the value?

A. I would consider it would make quite a difference.

Q. How much difference?

A. Oh, a plank house isn't so valuable by considerable. I don't hardly know. I never built a plank house. In making that estimate, I aimed to make an estimate for a new house the size of this and finished in about the same kind of finish that is on this.

Q. Do you know about how old this Herbert house is?

A. I don't remember the time it was built. I remember of seeing it when it was in course of erection, but I can't remember how many years it is since. Since the first part was built, I would say it was fifteen years ago, possibly more than that; but I think it was that long.

Q. Is there any business carried on in the neighborhood of the Herbert house, and, if so, what is it?

A. The manufacture of coke is carried on right there by it; there is a town, Dawson, that is the nearest business point. That is something over half a mile away.

Q. To what extent is the manufacture of coke carried on in the neighborhood of the Herbert house?

A. I don't know exactly how many ovens Mr. Rainey has in operation there at the present time; there is quite a lengthy string of ovens on that side of the river; and across the river is another works; something over a hundred ovens, I think.

Q. Have other people that you know of, any ovens in the neighborhood?

A. Well, further up the road there's ovens.

Q. Whose are they?

A. The Adelaide works are owned by the Frick Coke Company, on the same side of the river; I am not positive as to who are operating the different works along the river there.

218 Cross-examination by Mr. GARRISON:

Q. You say you may have heard of there being a town called Sedgwick there in that neighborhood?

A. There is a possibility that I have heard something of it, but I have no recollection at all of it at present; if I ever did, I have forgotten it entirely.

Q. In passing up and down there, as you speak of, did you ever pass in front of this Herbert house?

A. I passed in front of it, yes; frequently.

Q. Did you ever pass up the other way, at right angles with that passage-way in front of the house?

A. I have passed up the branch road which runs at right angles to the road in front of the house.

Q. What was the road called?

A. It was the road to the Jimtown works, Spring Grove, etc.

Q. Did you ever look around there and make any examination

or investigation to see whether there are pins there indicating streets and lots?

A. I never did.

Q. You don't know, then, whether there were any pins of that kind or not?

A. I don't know of such.

Q. When did you first begin the construction of buildings—building operations?

A. In the year 1870 my brother and I built two houses.

Q. Where did you build those?

A. In East Liberty.

Q. What was the cost of those?

A. About from nine, to ten or eleven hundred dollars apiece.

Q. How many rooms in each of them?

A. Four and five rooms.

Q. How many houses have you constructed since that time?

219 A. I couldn't tell you exactly; within the last two years I have built between twenty and twenty-five.

Q. Where did you build those?

A. In the neighborhood of our place; around in the vicinity.

Q. What do you call your place?

A. East Liberty.

Q. Name some of the parties for whom you built those houses.

A. I built one for J. R. Dunlap, one for Stangrove, for Frank Maddon, James Lacy, Wm. Johns, Ed. Hixenbaugh.

Q. What was the average price of those houses?

A. There were some of them as low as $635.

Q. How many rooms did those $635 houses have?

A. One of them had five rooms.

Q. Cellar under it?

A. No, sir.

Q. Stone foundation?

A. No, sir.

Q. Just on posts?

Q. Set on posts.

Q. How many coats of paint?

A. Two coats.

Q. One of them was——

A. No; excuse me. This one had but one coat of paint.

Q. Now, judging from this house, what is the estimate you put on the Herbert house?

A. The estimate I made on the Herbert house was $737.

Q. Do you — how many rooms are in the Herbert house?

A. I included five rooms.

Q. Do you — how many rooms there are?

A. I wasn't inside; only I was told——

Q. Then, you don't know how many rooms there are?

A. I don't know.

Q. Do you know what the finish is inside?

A. No, sir.

Q. You don't know what kind of painting there is inside?

A. No, sir.

220 Q. Were you ever inside of the house?

A. I never was.

R. Did you ever make a measurement as to the size of the house—its dimensions?

A. No, sir.

Q. Do you know the extent of the repairs that have been put on the house since it was first constructed, the improvements that have been made on it?

A. I don't know that I do exactly: except in one respect—it has been reweather-boarded, or, rather, weather-boarded.

Q. What kind of a roof is on it?

A. It's a shingle roof, a wooden roof.

Q. Is it a new or an old one?

A. Oh, from the appearance, I should think it was twelve or fifteen years old; I couldn't say exactly as to that.

Q. Have you ever bought and sold, or bought or sold, any property in that immediate neighborhood?

A. Not on that side of the river; no, sir.

Q. Did you ever build any houses for Mr. Rainey?

A. No, sir.

Q. At whose instance did you go up there and make these estimates?

A. At the instance of Mr. Skelly.

Q. For whom was Mr. Skelly acting?

A. For Mr. Rainey, I believe.

Q. You say there are some coke ovens operated there near the Herbert house?

A. Yes, sir.

Q. How close to the Herbert house?

A. Why, I would say there are some of them within fifty yards, possibly closer than that.

Q. On which side of the house are the ovens being operated?

A. They are between the house and the river.

Q. Is that a single or a double line of coke ovens that is operating?

221 A. There is a double line started there; that is, you mean a double block?

Q. Yes.

A. It is single, I think, the first line that is built there.

Q. Is he operating all of the ovens in that single line of coke ovens?

A. I don't know; I wasn't clear along the full line of ovens.

Q. Did you notice whether he is making coke in the end down next to the house?

A. At the lower end of the second tier, do you have reference to?

A. At the end of the middle row of coke ovens nearest to the house?

A. I think they are, in the lower end of the single row.

Q. That is, the end closest to the house in the single row?

A. Yes; that end extends past the house, on down the river below the house.

Q. But, as near as you recollect, how close did this end of the single row of coke ovens come to the house?

A. Well, the end is not as close to the house as it is quite a distance from the end, understand. The house is up quite a ways from the end. As near as I could state, without a measurement, and without looking at it with a view to guessing at the distance, it is about thirty-five yards; maybe thirty yards.

Q. Now, isn't there a double line of coke ovens on one side of the house and a single line of coke ovens on the other side of the house, with an opening between the two lines just immediately in front of the house?

A. The single line of ovens extends clear past the house, as though the house was located here (indicating), and the ovens extend clear past; and then the double row is built back of that—leaving an opening in the centre opposite the house.

Q. Are they operating the ovens in that single line up next to the house?

222 A. I think they are; yes. I think that is being operated all along, if I remember correctly.

Q. Who was it that refused you admittance to the house?

A. I didn't ask for admittance to the house.

Q. Now, Mr. Oglevee, you say that there is an opening in these coke ovens immediately in front of the Herbert house?

A. That is, an opening in the second tier.

Q. Immediately in front of the house?

A. Yes, sir.

Q. What would be the effect on this house if that opening should be closed up and the ovens operated there, just as they are now operating them on that single line?

A. I think it would burn it down.

Q. I call your attention now to the condition of the ovens on the other side of that opening from the row where they are now operating. How close is the nearest oven to the house on that side?

A. I am not prepared to answer that very exactly; I should say, though, at a guess, fifty yards distant—to the best of my recollection.

Q. Don't the uncompleted ovens on that side of the house come down within forty or fifty or sixty feet of the house—the double block?

A. Well, they might possibly come closer than I was at first thinking; but I can't say as to that; I made no measurements and I didn't look at it with a view to guessing at the distance when I was there a few days ago.

Q. What would be the effect on this property if those ovens should be started and operated there?

A. It would make it a very smoky place in there, to say the least.

Q. Would it be a pleasant place to live?

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A. I don't think so. It wouldn't be for me.

Q. That road that you speak of that came up in front of the Herbert house there—what is in that road there now, if anything? Isn't that road completely blocked up with Mr. Rainey's coke ovens? That roadway or passage that you traveled up and down for years there?

223

A. I think that is closed up, unless there is a road down close to the railroad; I don't know as to that; I haven't been along there with a team.

Redirect examination by Mr. DICKEY:

Q. How did you find the painting of that house? Did you make an examination?

A. It appeared to have a coat of ochre and oil, as I suppose from the appearance, except in the gables; the gables or upper part of the two ends were apparently skipped and left unpainted.

Q. You say that the dimensions of this house were given you?

A. Yes, sir; Mr. Skelly told me what he thought the dimensions were.

Counsel for defendant offers Exhibit "A" in evidence.

F. E. OGLEVEE sworn on behalf of defence.

Direct examination by Mr. DICKEY:

Q. Where do you reside?

A. I reside in Vanderbilt, Fayette county.

Q. How far from this property of the Herberts?

A. About a mile and three-quarters.

Q. Are you familiar with the property?

A. Yes, sir.

Q. How long have you known it?

A. I have known it since '70 or '71; it was not completed at that time.

Q. Have you resided there since '70 or '71?

224

A. I have resided on the opposite side of the river. I was at that place about three years.

Q. And then moved to the opposite side of the river?

A. I went from there to the Mount Pleasant branch in the neighborhood of Scotdale, or within a mile of Scotdale, and was there for two years, and then I went on the other side of the river.

Q. Since you moved to the other side of the river, have you been familiar with the property?

A. Well, I have known it.

Q. Will you state whether, at any time since you have known the plaintiffs' property, there was any town laid out in its vicinity, or anything to indicate a town?

A. No, sir; I don't know of any.

Q. What was the appearance of the land in the vicinity of this property, immediately surrounding it?

A. It was just an open piece of land, and was not enclosed.

Q. What was the land used for in the vicinity?

A. Well, they weren't making any use of it at all.

Q. Do you know whether there were any monuments on the ground, to indicate any laying out or division of property there?

A. No, sir.

Q. When you answer "no," do you mean that you don't know, or do you answer in the negative? Were there any such monuments, to your knowledge?

A. I don't know that there were.

Q. Have you had an opportunity of becoming familiar with the values of such properties as that of the Herberts?

A. Well, I have a slight knowledge of the value of such property.

Q. Have you dealt in or bought or sold such property?

A. I have bought such property.

Q. Within what time have you done that—how many years?

A. Well, I have bought several of them in the last ten years.

225 Q. What, in your judgment, is the value of the Herbert property as it stands, the house and lots together, as unaffected by the coke ovens which are in controversy here?

Objected to by counsel for plaintiffs, because the witness does not show that he has sufficient knowledge of the value of property in that vicinity to enable him to form a reasonably correct judgment of the value of this property.

A. I would value it at $1,000.

Cross-examination by Mr. GARRISON:

Q. Mr. Oglevee, you say you have bought properties in the last ten years. Where were those properties located?

A. On the opposite side of the river from that place.

Q. How far away from this Herbert property were they?

A. Well, a mile and a half, some of them two miles away, or a mile and three-quarters.

Q. Up the river or down the river from this property?

A. Right across the river from that place, about a mile in a direct line.

Q. How many of these properties did you buy and sell?

A. I didn't sell any.

Q. How many did you buy?

A. Four, I believe; and I built two.

Q. What did the four cost you, each?

A. They cost about $1,000 and less.

Q. How much ground had they in connection with each one of them?

A. One of them has an acre, and I think the others are a quarter, probably.

Q. How close are they to any coke ovens?

A. A quarter of a mile, the nearest.

Q. Were you ever inside of the Herbert house?

A. Not since it was finished.

Q. When were you last inside of it?

226 A. Well, I was in it in 1872, I think.

Q. Who lived in it then?

A. No one.

Q. It was not yet finished?

A. No, sir.

Q. You don't know, then, what repairs or additions have been made to it since?

A. No, sir.

Q. Have you been on the ground there, to look after the property lately?

A. To look as this property?

Q. Yes.

A. Yes, sir.

Q. Did you observe any fruit trees on the premises?

A. Well, I didn't take particular notice to them, though I did see them. I don't know what they are.

Q. You didn't include those fruit trees in your estimate of the value of the property?

A. No, sir.

Q. Did you notice to see whether there is a well of water on the premises, or what improvements there are except the house?

A. Well, I think there is a well of water, but the other improvements I didn't take particular notice to.

Q. Mr. Oglevee, you say you don't know of any town laid out there?

A. No, sir; I don't know of any. I may have heard some talk of it when I went there, but I know there was none laid out since, or about the time I went there.

Q. Did you ever go on the premises there to examine and see whether there were streets and alley and lots staked off there?

A. I have crossed over, and I didn't notice anything of the kind.

Q. You didn't look for them?

A. I didn't make any special effort to find anything of that kind.

227 Redirect examination by Mr. DICKEY:

Q. Did you take into account the well, in making your estimate of the value of the property?

A. Yes, sir.

Q. Can you state how many fruit trees you noticed there?

A. No; I can't.

Q. You testified that you have bought properties similar to this within ten years. When was your last deal of that kind—how long back?

A. I believe it was about three years ago; probably three in the spring.

Q. Will you state whether the properties which you bought were nearer to or farther from Dawson Station than this?

A. There isn't much difference in the distance.

Q. How did the property which you bought compare, lot for lot, of same size, in value with this?

A. Well, I would say that some of them were better, worth more money than that one; some of them not so good, probably.

Recross-examination by Mr. GARRISON:

Q. When did you last look at this Herbert property, with a view to put an estimate upon it?

A. Well, I think it was in—well, it has been five or six months.

Q. Have you seen the property recently?

A. Only in passing.

Q. Doesn't it look in a dilapidated and bad condition now, with the surroundings there, that would depress your estimate of it?

A. I didn't take into consideration anything surrounding it.

Q. Isn't the general appearance of the property, as affected by its surroundings, bad?

228 A. Well, it doesn't add anything to its appearance.

By Mr. DICKEY:

Q. When you looked at it last, were or were not the coke ovens that are in controversy here erected?

A. Well, they were in course of construction at that time.

Q. When you placed an estimate on the property, how was that estimate formed?

A. Well, from what the property would rent for.

Q. What I mean by my question is this: In placing an estimate upon the value of the property, what had the coke ovens to do with it, if anything?

A. Nothing.

By Mr. GARRISON:

Q. At the time you made your estimate, these coke ovens, you say, were in process of construction, were they?

A. Yes, sir.

Q. Well, what would the property be worth with the ovens there?

A. I don't know; it wouldn't be worth very much; that is, the house.

By Mr. DICKEY:

Q. With the ovens there, would the value of the lot be taken away, or only the house?

A. Oh, not entirely. The lot would be worth something.

JOHN H. SKELLY, sworn on behalf of defendant.

Direct examination by Mr. DICKEY:

Q. Where do you reside?

A. East Liberty.

229 Q. Dunbar township, Fayette county, Pennsylvania?

A. Yes, sir.

Q. What is your business?
A. Carpenter and builder.
Q. How long have you been in that business?
A. About nineteen years.
Q. During that time I suppose you have had a general experience, have you, in the building business?
A. Yes, sir.
Q. Have you built houses?
A. Yes, sir.
Q. And from your experience in building, are you able to give the cost and value of houses and buildings generally?
A. Yes, sir.
Q. Are you employed by Mr. Rainey, the defendant here?
A. Yes, sir; I am at the present time.
Q. What are you doing for him?
A. Building.
Q. In the course of your employment in business as a builder, have you occasion to make estimates of the value of houses and of the cost of them?
A. Yes, sir.
Q. Are you familiar with the property of the Herberts, the plaintiffs in this case?
A. I have been by that way a number of times.
Q. Have you made an examination of the building?
A. I have been over there; and I didn't get to see the interior of the house; saw the outside.
Q. Did you make any measurements?
A. Yes, sir.
Q. Just state what you did in the way of measurements.
A. That is, in getting the size of the house?
Q. Yes.
A. The house proper is 16 x 32; 16 feet high; and a kitchen 16 x 18, and 9½ feet in height.
Q. Frame house, is it?
230 A. Well, yes, sir; it's a frame building. In the first place, it was a plank house, I believe, when I saw it some five or six years ago; boarded up and down.
Q. You mean boards, weather-boards put on the outside?
A. No; rough boards; a plank house, rather, up and down.
Q. Since then, what has been done if anything?
A. Siding has been put on the outside, and new roofs, and new frames, mostly.
Q. What do you mean by new frames?
A. New window frames was put in a portion, and new sash.
Q. Who was with you when you made an examination of the house?
A. There were two other gentlemen with me; Mr. Coburn was one; I don't recollect now who the other man was.
Q. What I want to find out is this: Whether you furnished your figures, your estimates, to anybody else, and, if so, who it was?

A. No, sir; I didn't. I will take that back; I might have told some one the size of the house; I wouldn't be positive about that.

Q. Did you go inside of the house?

A. No, sir.

Q. Why didn't you go inside?

A. Why, Mr. Herbert came to the door, and I asked him to see the inside, as his son told me I could come there at any time and look at the inside.

Q. What is his son's name?

A. Thomas; but he wasn't at home at the time.

Q. Well, did Mr. Herbert allow you to go in?

A. No, sir.

Q. Did you make an examination of the house then, as far as you could, with a view to ascertaining the value and cost of such a house?

A. Yes; as far as I could learn, why, I did.

231 Q. From the measurements and the examination made of that house. what would be the cost of erecting such a house as that, within any time within the past year?

A. I figure it at $797.25. That would be to build a new house of that size. That is, figuring everything at what I call a high price for material. I have all the items down here, if they are any good, so that they can be seen.

Q. How old is this house?

A. I really couldn't say.

Q. How long have you known it?

A. I have known it for about eight years.

Q. Well, in your judgment as a builder, is the house as good as a new house?

A. No, sir; I think not.

Q. You have testified that you figured what it would cost to build a new house of that description.

A. Yes, sir; a new house of that size—to finish it as far as that house is finished.

Q. Now, state, in your judgment, what percentage of value this house would be less than the value of a new house such as you have testified to—what difference in value would there be—what percentage?

A. Well, there would be almost a third difference.

Q. I wish you would state what experience you have had in building houses of about that cost.

A. Well, I have built quite a number of houses. I suppose I have built somewheres in the neighborhood of two hundred.

Q. Of that class?

A. No, sir; they wouldn't all be that class of a house; different-sized houses.

Q. How would they compare with this house?

A. Some of them would be better, and some not so good.

Q. Mr. Skelly, have you had an opportunity of becoming acquainted with the value of similar land in the vicinity?

A. All that I know is what some property sold at.

232 Q. That is the best evidence. Are you able, from your knowledge of the land and of sales in the vicinity, to state what, in your judgment, this property of the Herberts is worth—the ground?

A. Only this far; there was a house and lot right next to where I lived that was sold for $1,000, of about the same-sized house, or nearly so, as what that is, a five-room house. Of course the location where this house was sold for $1,000 is a much more desirable location.

Q. State what the Herbert propert-, as a whole, would be worth, as unaffected by the coke ovens which are in controversy here. Take it as it was before the coke ovens, which are in dispute here, were commenced; what would be the fair market value of the property as a whole? Taking the property as it stands, and leaving out the depreciation in value which the coke ovens would cause to it, state what you think the fair market value would be, as a whole.

A. I think $1,000 would be a fair price for it.

Q. How long have you been familiar with that property, how long have you known it?

A. About eight years.

Q. During that time have you ever heard of any town of Sedgwick?

A. No, sir; I never did.

Q. Will you state what the appearance of the ground surrounding that property is, and whether there is on the ground anything to indicate a town, or are there any monuments to show lots or streets laid out?

A. No, sir; I never seen any.

Q. What is the appearance of the ground surrounding those premises?

A. Just a commons, and right back of it is a woods on the hillside. There's only one house right near there. I have built two blocks within a short distance of that.

Q. How close to there did you build the two blocks of houses?

A. I suppose it must be, probably, five or six hundred yards, as near as I can tell.

233 Q. Were the blocks of houses that you built erected with reference to any street, or alleys, or ways?

A. No, sir; there was a road that came in on the back of the house. That —about the only way I know of to get there.

Q. What was that road?

Q. That was the road that goes around through Hulltown from Dawson.

Q. What I mean is, was it a township or a county road?

A. I believe that it is a county road, so far as I know; it's the only way to get there that I know of.

Q. Did you examine the paint upon this house of the Herberts?

A. Yes, sir.

Q. How is it painted?

A. It has had one coat, what we call the priming coat—ochre and oil, I suppose.

Q. Was it all painted in the same way?
A. That is, all around the house was painted that way; that is, the outside of the house.

Cross-examination by Mr. GARRISON:

Q. You live in East Liberty?
A. Yes, sir.
Q. How long have you lived there?
A. I think about five years.
Q. Where did you live prior to that?
A. In Dawson.
Q. How long did you live there?
A. Three years.
Q. Where did you live prior to that?
A. Cleveland, Ohio.
Q. Then you have lived in Fayette county about eight years?
A. Yes, sir; about eight years.
Q. What were you engaged in while you lived in Dawson?
234 A. Building.
Q. Were you then in the employ of Mr. Rainey?
A. Yes, sir.
Q. You have been in Mr. Rainey's employ ever since you have lived in Fayette county?
A. Yes, sir.
Q. Are you now in his employ?
A. Yes, sir.
Q. And it was as one of his employés that you went up and put an estimate upon this property?
A. Well, I was told, of course, to make an estimate on it.
Q. Who told you to make that estimate?
A. Mr. Mitchell.
Q. Who is Mr. Mitchell?
A. Superintendent.
Q. Whose superintendent?
A. For Mr. Rainey.
Q. At the time you did that, you were in the employ of Mr. Rainey?
A. Yes, sir.
Q. Have you built any houses in Fayette county since you have been there, except those you have built for Mr. Rainey?
A. No, sir.
Sander
Q. Those are generally houses for the operatives under Mr. Rainey?
A. Yes, sir; for his employés.
Q. The employés at his works?
A. Yes, sir.
Q. The estimates that you give, then, for the houses that you have built are the cost of the houses to Mr. Rainey?
A. No, sir; oh, no.

Q. Well, how did you estimate the cost?

A. I estimated this here——

235 Q. I have reference to the houses now that you have built for Mr. Rainey.

A. Yes, sir. This estimate that I have given in these is the same as if I would go to the mill there to Mr. Rush in Dawson, or to Mr. McClure in Vanderbilt and buy the lumber of them. If I was to figure this on what Mr. Rainey can buy lumber for, it would be away under that.

Q. Now you estimate the cost of this house of the Herberts according to your knowledge of the cost of building as you derived it from building for Mr. Rainey?

A. No, sir.

Q. You have already stated that your whol eexperience in house-building has been for Mr. Rainey?

A. No, sir.

Q. Have you built any other houses in Fayette county, except for Mr. Rainey?

A. No, sir; not in Fayette county.

Q. Then, in giving your estimates for the Herbert house did you base them upon estimates of the cost of building the Rainey houses, or other houses?

A. Other houses.

Q. Where were those other houses built that you used on which to base your estimate?

A. I base it on the selling price and what you can get the work done for, not on what Mr. Rainey could get it done for.

Q. What I ask you is, whether you derived your knowledge of the cost of building that enabled you to put an estimate on the Herbert house from your experience in building the Rainey houses?

A. No, sir.

Q. Where did you derive your information or knowledge about buildings that you based your judgment on?

A. I have said before how I got the price. Put the mason-work at what it cost them, so much for stone—not what Mr. Rainey might get it for; and also on the lumber, not on what he could buy it for, but on what anybody else could go to the mill and buy it for.

236 Q. Then on that estimate you didn't allow anything for a contractor who would take the building on a general contract?

A. Certainly, I did.

Q. How much did you add for the contractor? Suppose a building like this was to be constructed by a man under a general contract, does your estimate include a profit for that contractor?

A. Yes, sir; it would.

Q. How much profit did you include for him?

A. I suppose on that house there—that is, if I went to the mill and bought the lumber and put up the house myself, and went to the mason and got him to estimate on it, I would have a margin on

each one of those; I will have a margin on my lumber and on the material in general.

Q. You have, then, in the calculation on which you based your estimate allowed a specific sum to a contractor who might take the building to build on a general contract?

A. Most assuredly. Why, if a man takes a contract, he figures on it so as to make something.

Q. Your estimate, then, includes a specific sum as a profit for a general contractor who might take the building on a general contract?

A. Yes, sir.

Q. What specific sum did you give to the general contractor as his profit?

A. I have figured this, as I said before, so that there is a margin on everything for the man that takes the work. On the stone-work there is a margin, and on the brick-work there is a margin, and on the plastering there is a margin, and on the lumber there is a margin, and on the labor,—that is, on the carpenter-work.

Q. Now, how much did you estimate the lumber at?

A. It is different prices.

Q. Well, the studding.

A. The studding I figured that at fifteen dollars per thousand.

237 Q. How much margin does that give the general contractor on the price of that lumber?

A. That ought to give him about four dollars.

Q. What kind of lumber would that be?

A. That would be hemlock lumber, such as is generally used in buildings.

Q. What could that be bought for in the markets and delivered there on the premises—how much per thousand?

A. Now, you understand this: I will make out my bill and I will buy a car-load. I can get it put in the car at $9.25 per thousand, and the freight, probably, would be $1, probably, $1.25.

Q. How much would that lumber be worth, laid down, say, at this Herbert building?

A. You could call that $11.

Q. And you have allowed $15?

A. Yes, sir.

Q. And that is four dollars margin for the contractor?

A. Yes, sir.

Q. On every thousand?

A. Yes, sir.

Q. How many thousand feet did you estimate of that kind of lumber in this building?

A. There is 4,000 feet of 2 x 4 and 2 x 8 and 6 x 8.

Q. 4,000 feet of studding?

A. Yes, sir; studding and joist.

Q. That would make $16 as his profit on the studding. Does oak frame or studding cost any more than hemlock?

A. Why, it might cost a little more, an oak frame might.

Q. Well, then, if the frame of this house was oak instead of hemlock, your estimate would not be high enough?

A. The difference, though, is very small in oak and hemlock; probably fifty cents on the thousand.

Q. I ask you to make an estimate now on the stone-work.

A. 40 perch of stone-work.

Q. How much did you estimate that as costing a perch—constructed in the wall?

238 A. I have figured it at $2.50 per perch.

Q. Is that the ordinary price for constructing rubble masonry up there?

A. No, sir; about $2.10 and $2.15; sometimes we get $2.20.

Q. And you have estimated this at how much?

A. $2.50.

Q. And you say that $2.15 is the ordinary price for constructing masonry such as this?

A. Yes, sir.

Q. And you put the thirty-five cents on as the profit for the contractor, the margin for the contractor in the construction of the house?

A. Yes, sir.

Q. How many perches were there, did you estimate?

A. 40 perches.

Q. How much would that make the profit of the contractor on the masonry?

A. That would be 40 times thirty-five cents, or fourteen dollars.

Q. $14?

A. Yes, sir.

Q. Now, what did you estimate for the plastering?

A. I estimated for the plastering 409 yards of plastering.

Q. At how much a yard.

A. At twenty-five cents per yard.

Q. And how much did you allow the contractor as a margin on that?

A. Well, in figuring on that, why, a man would buy his lath for so much—that is, giving you the outside price on the plastering (let it be little or great)——

Q. Well, how much did you figure as his margin on the entire plastering?

A. Well, in getting plastering done, I don't know as I have figured any margin, any more than I would state this: that if I wanted to get it done, I would buy the lath, and I would get

239 the lather to put them on for so much a thousand, and hire a plasterer by the day; and that would fetch me out with a margin.

Q. How much would that margin be on the entire plastering?

A. I don't know as the margin would be very great on that; that is, provided that house is plastered.

Q. Now, let us pass to the excavating. What have you got for that, for the cellar wall and the cellar?

A. Well, I believe I have omitted that.

Q. Well, how much siding have you?
A. I have got 2,500 feet of drop siding.
Q. How much did you estimate that at?
A. $25 per thousand.
Q. Dressed?
A. Yes, sir; dressed.
Q. What is the market price of siding, dressed and delivered on the ground in that locality?
A. That is, in that locality there, or if I was to buy it?
Q. No; what is it worth as laid down on the ground, the probable cost to the Herberts to put it there on the ground?
A. I don't know; they may have had to pay, probably, $22.
Q. And you have figured, then, three dollars a thousand——
A. No, sir; if I was to buy that siding, I can get that delivered there at $18.
Q. I am asking about how much it would cost to lay that siding down there for use on the premises, to any ordinary purchaser?

Mr. DICKEY: That question should be, What would it cost the contractor?

Question read by the stenographer.

A. $22.
240 Q. $22 a thousand. Is it white pine, choice white pine?
A. No, sir; that is not choice white pine. That is, you want for the same grade of siding that is now on the house?
Q. Yes. What kind of siding is on the house?
A. It's a second grade. It isn't clear white-pine siding; that is very seldom used in that kind of a house.
Q. It is fair siding?
A. It is fair siding; yes, sir.
Q. How much margin did you figure for a contractor on that siding?
A. I gave it to you at $22, and I figured it at $25. That makes $25 delivered on the ground.
Q. Now, about the roof. What did you figure for the roof?
A. I figured 9,750 shingles at $4.50 per thousand.
Q. Is that the market price for shingles delivered there on the ground?
A. I think not.
Q. What is the market price?
A. From $4 to $4.25.
Q. Then, the difference is the margin you would give to a contractor in putting up the building. How much did you allow for the ceiling of the inside of the building, any ceiling that may be on the inside of the building.
A. I give it here as 409 yards.
Q. That is plastering?
A. Yes, sir.
Q. You didn't make any allowance, then, for any lining inside, that is, ceiling of boards?

A. You understand that if it isn't plastered the lining would amount to very nearly the same as the plastering would.

Q. Then you made no estimate for any ceiling?

A. As I understand it, it would be worth the same as the plastering, and I can't figure what it was. I figured it about the same as the plastering would be, provided it would be painted.

241 Q. You were not inside of the building at all?

A. No, sir.

Q. You don't know how much is plastered, or how much is ceiled?

A. No, sir; but I have given the total number of yards.

Q. You don't know whether it is frescoed or not?

A. No, sir; I don't know anything about that. Whether it be plastered or ceiled, they would both figure at about the same.

Q. You gave the margin that would be on the plastering. Now, what other items are in your estimate?

A. Why, there is the sheeting.

Q. That is, the sheeting for the roof?

A. Yes, sir.

Q. What did you estimate for it?

A. 1,500 feet.

Q. How much per thousand?

A. $15 per thousand.

Q. That is the market price for that laid down there for use?

A. Well, they cost about the same as 2 x 4 or 2 x 8—about the same price.

Q. What did you estimate for it?

A. $15 per thousand.

Q. And you thought that would cost about $11?

A. Yes, sir.

Q. And that makes a margin of $4 a thousand for that; and that would be about $6?

A. Yes, sir; on 1,500 feet, $5.50.

Q. That gives him $5.50 margin on the sheeting?

A. Yes, sir.

Q. What other material have you there? What did you allow for the brick chimneys?

A. There's a terra cotta in the kitchen there, and I figured on there being three chimneys. I figured the brick-work at 4,000 bricks for three chimneys, and I had one in the kitchen and one at each side of the main building.

242 Q. How much did you figure it would cost the contractor to put those up?

A. It would cost $30, I figured it.

Q. That would be for the labor?

A. Yes, sir.

Q. Did you figure him a margin on that labor?

A. Yes, sir.

Q. How much did you give him on the labor?

A. Those chimneys can be built for $11.00 apiece. I have built larger chimneys than those for $11.00.

Q. Those were constructed for Mr. Rainey?

A. No, sir; I generally let out the contract for those myself to masons and bricklayers.

Q. Mr. Rainey could get them built for that, could he?

A. No, sir; I could get them built for that.

Q. For him?

A. For him; yes. I let out the work.

Q. And isn't it a fact that he gets those things cheaper, material and labor, etc., and those buildings constructed cheaper than they could be constructed by other people, that are not operating up there as largely as he is?

A. I don't know that he could get those chimneys built any cheaper. There's a certain man that builds them, and he wouldn't build them any cheaper for him than for anybody else.

Q. He has a good many to build?

A. Sometimes.

Q. Where there are a good many to build he gets them built cheaper than if there were only a few?

A. I don't know as he does. I don't know that it makes any difference.

Q. How much did you estimate for the carpenter-work, the labor in constructing that house?

A. Excuse me, if you please. Then, you understand, in the chimneys there is the lime and the sand that is added to these; that is $10.00; making a total of $72.00 for the chimneys.

243 Q. That is, the labor and material?

A. Yes, sir.

Q. And the contractor's profit?

A. Yes, sir.

Q. How much profit did you give to the contractor for those chimneys?

A. $10.00; anywhere in the neighborhood——

Q. You gave the contractor on those chimneys, a margin of how much?

A. Say about $6.00.

Q. Have you an estimate of the flooring?

A. Yes, sir.

Q. What kind of flooring did you figure on?

A. I figured on hard pine generally used, or oak, whichever is in it; there isn't very much difference in the cost. I figured that at $25.00 per thousand.

Q. How much margin did you give the contractor on flooring?

A. That would come at the same as the siding does.

Q. You gave him $3.00 a thousand?

A. Yes, sir. There is 1,700 feet.

Q. That makes how much profit on the flooring?

A. $5.10.

Q. Now, what is your next item in the estimate of materials?

A. Then there is another 2,000 feet of surface boards, such as used for frames and base boards, whatever it might be necessary to use it for. I estimate that at the same—$25.00 per thousand.

Q. And how much did you allow as the margin of the contractor on that? First give us the amount of that.

A. 2,000 feet.

Q. And what margin did you allow the contractor on that—same as the other?

A. Well, this can be bought for less; but I figure on all those items high. That could be bought for $18.00 per thousand; I figured it at $25.00.

244 Q. Why did you figure it high? Why didn't you figure it neat?

A. Because I wanted to get the margin on.

Q. You figured it high so as to cover the contractor's margin, and give him a reasonable margin?

A. Yes, sir.

Q. What is your next item?

A. Then there is twelve windows, I believe.

Q. What have you figured the windows at?

A. I figured them at $1.75 apiece.

Q. That is, you mean the sash and the frame?

A. No, sir; the sash and the glass—not the frames.

Q. You figured them at $1.75?

A. Yes, sir; a total of $21.00.

Q. How much margin would the contractor have on each?

A. Probably twenty-five cents a window.

Q. That would give him a total of how much?

A. That would be $3.00.

Q. What is your next item?

A. Eight doors; that is, as near as I could judge; I can't say as to them, because I wasn't in the house.

Q. How much did you figure them at apiece?

A. I figured those at $2.00 apiece.

Q. Does that include any margin for the contractor?

A. Yes, sir; that includes, I think, 25 cents each.

Q. Twenty-five cents a door?

A. Yes, sir. Some doors are cheaper; you can get some doors for $1.35. Of course I can't tell just what is inside; I just figured it at eight doors.

Q. What is your next item of material?

A. I have figured here $8.00 for locks and latches that might be on the house.

Q. $8.00 for locks and latches?

A. At least for hinges and locks.

Q. Have you any other estimate for hardware except that $8.00?

A. Yes, sir.

245 Q. Before you pass to your next give us the margin that he would have on that $8.00.

A. On the $8.00 for the doors, you mean?

Q. Yes.

A. I said he would only have 25 cents. Some doors you can buy for $1.35, and some for $1.75. I figured for $2.00. Of course I can't tell what kind of doors are in the house.

Q. Have you allowed any margin on them?

A. The ordinary price is $1.75, and I have allowed $2.00; that is, first-class doors.

Q. Now, your next item.

A. I have allowed $25.00 for painting, on what I could see on the outside.

Q. Did you allow anything for painting on the inside?

A. I didn't see that, so I couldn't.

Q. You estimate that it would cost $25.00 to paint the house as it is?

A. Yes, sir; that is figuring it high.

Q. How much would the contractor have as a margin on that?

A. He would do pretty well on that. It would be four days' work; that would be $10.00;—about fifteen, sixteen, call it eighteen dollars. I figured it at $25.00.

Q. He would have a margin of $7.00 on that, then. Now what is your next item?

A. I figured on nails $15.00.

Q. What margin would the contractor have on the nails?

A. He would have a couple of dollars, maybe.

Q. $2.00?

A. Yes, sir.

Q. What is your next item?

A. Then I figured $148.50 for the building of the house.

Q. That is, the labor?

A. That would be the carpenter-work.

Q. Those are your items?

A. Yes; I believe they are.

246 Q. How much margin would the contractor have on labor at that figure?

A. At that figure I don't know as he would have a great deal of a margin on that; I don't think he would.

Q. Those are all the items that you have taken into consideration in your gross estimate of $797.25 for the construction of the building?

A. Yes, sir.

Q. And you have allowed the contractor's profit in that estimate?

A. Yes, sir.

Q. You didn't go inside of the house at all, you say, and was refused admittance. Who refused you admittance?

A. Mr. Herbert and Mrs. Herbert.

Q. Which Mr. Herbert?

A. The old gentleman and old lady.

Q. Mr. Thomas Herbert, nor George never refused you admittance, did they?

A. No, sir; Thomas told me I could come there at any time; but he wasn't at home when I went there.

Q. Have you ever bought any vacant ground around there, near this Herbert property?

A. No, sir; I don't own property there.

Q. You don't own any real estate there?

A. No, sir.

Q. You don't know, then, what ground, lots like this have been selling for in that immediate neighborhood, around the Herberts' there?

A. No, sir; I don't.

Q. When did you last see this Herbert property?

A. It seems to me I was there Monday of this week, if I ain't mistaken.

Q. You put your estimate upon it from your observations made there that day, or since then?

A. Since then.

Q. At the time you saw the property then, within the last week as you have stated, its general appearance there was not very favorable, was it?

247 A. In what respect?

Q. The general appearance of the property—don't these coke ovens in front of and around about it give it an unfavorable appearance, or do they add to the value of the property—its appearance in the market?

A. Why, no; you couldn't say it would add to the property.

Q. You were all around the house, were you?

A. Well, pretty near, you might say all around it.

Q. Is the lot enclosed within a fence?

A. Why, the front part of the house isn't.

Q. There is no fence in front of the house?

A. No, sir; that is, at the side, you might say.

Q. What is immediately in front of the —?

A. Why, there is a cellar door that goes in from the front; goes in this way into the cellar, and right above that door that would be for a little platform, and a porch that comes out from the first floor.

Q. What is on the ground immediately in front of the house—how is the ground occupied immediately in front of the house, out for a distance of, say, thirty feet?

A. Why, the railroad is in front of it.

Q. What is there between the house and the railroad?

A. There is only the earth there.

Q. What obstructions, or what is on the ground, if anything, between the railroad and the house?

A. I really didn't notice.

Q. Isn't there some stone there for the construction of a stone wall?

A. There might be.

Q. Isn't there a stone wall partly constructed immediately in front of the house, or did you observe that?

A. There might be; I didn't notice particularly.

Q. Are there any coke ovens?

A. Yes; on the side. I suppose, from the end of the property—I can't say how far it is.

248 Q. You observed coke ovens, then, on either side of the house, did you?

A. That is, going down the river; there is coke ovens down at the corner.

Q. Isn't there a double line of coke ovens on one side of the house, and a single line on the other side, with an opening immediately in front of the house?

Objected to by the counsel for defence, as not cross-examination.

A. Why, down in front of a little log house he has got there, or nearly so, they have started to build a double line of ovens, and then those stop off at the upper side—I didn't notice particularly—but somewheres a little back of their line fence that comes down along their property.

Q. You say you didn't observe the foundation for a coke oven in front of the house?

A. I didn't notice it.

Q. You didn't notice any stone lying there, apparently for the construction of a wall for coke ovens?

A. They may be there, but I didn't notice them.

Q. Didn't you observe the end of any coke ovens on either side of the house?

A. No, sir; because I came down along the fence.

Q. How far was the nearest coke oven that you noticed to the house?

A. I didn't take any particular notice to the coke ovens, and I can't state.

Q. Give us your judgment as to the distance, as nearly as you would estimate it.

Objected to by counsel for defense, as not cross-examination.

A. I couldn't estimate that, because I didn't take any particular notice how near the ovens are to the line fence; therefore I wouldn't want to commit myself.

249 Q. You wouldn't want to give your best judgment?

A. No; they may be twenty-five or they may be fifty feet; I didn't look.

Q. Were these coke ovens fired and manufacturing coke? Did you observe that?

Objection renewed by counsel for defense.

A. There's ovens up above there I know that are fired.

Q. On that side of the river—on the same side the house is on, did you observe any coke ovens on the same side the Herbert house is on that were fired and manufacturing coke?

A. This end ain't fired. I can hardly say how many ovens are fired.

Q. Then there are some ovens fired?

A. The ovens up above the house are fired up, but I didn't notice whether they were all fired, even; they might be and might not.

Q. Now, how are those ovens that are fired there connected with

his works—by means of a larry track? How are they charged—by means of a larry track on the ovens?

A. Yes, sir; a larry track on the ovens or at the side; I rather think it's a side larry.

Q. Where do they get their coal from?

A. Across the river.

Redirect examination by Mr. DICKEY:

Q. You say that in your estimate you have forgotten to include the cost of excavating. What should be added for the cost of the excavation?

A. That wouldn't be but very little, on account of it being on the side of a hill; but I suppose in digging that out it would cost probably $12.00.

250 Q. Is it your business, in your occupation of a builder, to be familiar with the market price of materials and labor used in buildings?

A. Yes, sir.

Q. And are you familiar with them?

A. Yes, sir.

Q. As to what you testified to with reference to the cost of materials and labor here true six months ago—has there been any change for six months?

A. No, sir; no material change for six months.

Q. Would an ordinary contractor in the market undertake the building of this house for the estimate you have put upon it?

A. I believe there's lots. I would like to build it myself for that money.

Q. In the market what is the ordinary profit received by contractors on jobs of that kind—what percentage of profit?

A. Some figure on five per cent. and some on ten per cent. profit.

Q. That is the ordinary margin of profit demanded by a contractor?

A. Yes, sir.

Recross-examination by Mr. GARRISON:

Q. Don't you know that there are architects who charge for superintending the building of houses five per cent.?

A. I believe that in some large building- in cities they get, probably, as high as five per cent.; but I don't know as I ever heard of architects getting as high as five per cent.; I have heard of them getting two per cent.

Mr. DICKEY:

Q. Did you ever know of an architect being employed for a house costing from seven to eight hundred dollars?

A. No, sir; I never did.

251 Hearing adjourned to meet on a day to be fixed by agreement.

A. That is, going down the river; there is coke ovens down at the corner.

Q. Isn't there a double line of coke ovens on one side of the house, and a single line on the other side, with an opening immediately in front of the house?

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Mr. DICKEY:

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A. No, sir; I never did.

251 Hearing adjourned to meet on a day to be fixed by agreement.

And now, to wit, Tuesday, March 1, 1892, pursuant to agreement as to date, parties met at the office of J. M. Garrison, Esq., at the hour of 11 o'clock a. m., and proceeded with the taking of testimony on behalf of defendant.

Present: Messrs. C. C. Dickey and Geo. Shiras, 3d, of counsel for defendant, and J. M. Garrison, Esq., of counsel for plaintiffs.

J. R. BALSLEY sworn on behalf of defendant.

Direct examination by Mr. SHIRAS:

Q. Where do you reside?
A. Connellsville, Pennsylvania.
Q. What is your business?
A. Contractor and builder.
Q. How long have you been in that business?
A. I have been in business eleven years myself, and have been connected with the business for about twenty years.
Q. And during that time have you had a general experience in the building business?
A. Yes, sir.
Q. You have built houses?
A. Yes, sir.
Q. And sold them?
A. Yes, sir.
Q. From your experience in the erection and sale of houses are you able to give the cost and value of buildings generally?
A. Yes, sir.
Q. In the course of your employment as a builder have you had occasion to make estimates of the value of houses and the cost of them?
252 A. Yes, sir.
Q. Are you familiar with the property of the Herberts, the plaintiffs in this case?
A. Why, I examined the property a few weeks ago.
Q. In that examination did you make measurements?
A. I measured the main part of the house.
Q. Can you give the dimensions of the exterior—that is, the length and width?
A. Yes, sir; sixteen feet wide, thirty-two feet long, and sixteen feet high, by the square.
Q. What kind of a house is that—what is the material in it?
A. It is a weather-boarded house. I don't know whether it has a frame in it, or whether it is what is called a "balloon" house.
Q. Could you state whether it has been weather-boarded recently?
A. It has been weather-boarded within the past few years.
Q. Did you go inside of the house?
A. No, sir.
Q. Did you ask for admission to the house?
A. Yes, sir; Mr. Mitchell did; he was along with me.
Q. What response did you receive?

A. A lady came to the door and said we couldn't come in.

Q. You were then compelled to make your estimates from the outside measurements of the house?

A. Yes, sir.

Q. Did you make an examination of the house then, as far as you could, with a view of ascertaining the value and cost of such a house?

A. Yes, sir.

Q. From the measurements and examination made of that house at that time, what would the cost of erecting such a house as that be, in your estimation—say, at any time within the past year?

253 A. Counting the house as one that is plastered on the inside and finished up in good, common, plain finish, the house new I estimated would be worth $828.41, provided it was a frame building, plastered inside and had an open stairway in it.

Q. That would be an advantage, then—an open stairway?

A. An open stairway costs considerable more.

Q. So, in making your estimate, you have made it on the basis of its having, for instance, an open stairway and all plastered walls?

A. Yes, sir; an open stairway, with a rail and balusters and newel post.

Q. Could you state how old this house is—is it a new house or an old house?

A. It looks as though it had been an old house and repaired up.

Q. Would it be as good as a house built such as you have estimated here, or would there be any such deterioration as would make it inferior to a house you could build for $828?

A. I would consider, from the appearance of the house and the information I had, there would be at least twenty-five (25) per cent. reduction of the cost of the new house and the old one.

Q. You say you have had experience in the erection and sale of houses?

A. Yes, sir.

Q. From such experience, would you be able to give your estimate as to the value of this house and ground—what it would be worth, in your judgment, in the market?

Objected to by counsel for plaintiffs, because it does not appear that the witness is acquainted with the value of real estate in that locality.

A. I would think a very fair estimate would be $950.00.

254 Objected to by counsel for plaintiffs, as not responsive to the question, and, for the further reason that it does not appear that the witness has any knowledge of the value of real estate in that locality.

Q. Where have you had your property dealings, and erected and sold the most of these houses that you have referred to?

A. Connellsville.

Q. How far is that from this place of the Herberts?

A. About five miles, I believe.

Q. What kind of ground is this that surrounds the Herberts' house, in general appearance and quality?

A. Well, it's kind of barren ground, I would say; I don't think it is very productive ground.

Q. Then, from your knowledge in the building, erection and sale of houses, you say that you consider a fair market value of this house and land at what?

A. Nine hundred and fifty dollars.

Cross-examination by Mr. GARRISON:

Q. How long have you lived in Connellsville?

A. Forty-eight years.

Q. Do you live there now?

A. Yes, sir.

Q. You say you have been engaged in the carpenter business about fifteen years?

A. I have been engaged in the carpenter business for twenty-odd years.

Q. And how long have you been engaged in the contracting business?

A. Eleven years nearly, and was connected with a contracting firm, for whom I run the business, for six years previous to that.

Q. You are now engaged in the contracting business?

A. Yes, sir.

255 Q. Where are you working?

A. Connellsville.

Q. Where have your contracts mostly been?

A. Principally in Connellsville.

Q. Have you ever built any buildings in Dawson?

A. No, sir; I never have; but I have sold materials there for buildings.

Q. Have you ever built any in the immediate neighborhood of the Herbert property?

A. Not nearer than two or three miles, I believe.

Q. Have you ever built any for Mr. Rainey?

A. No, sir; I believe not.

Q. Have you ever furnished him any lumber?

A. Yes, sir.

Q. Are you now furnishing him lumber?

A. I furnished him lumber a short time ago; to Wm. T. Rainey, that is; I have not furnished W. J. Rainey.

Q. It was for building purposes for W. J. Rainey?

A. W. T. Rainey.

Q. It was material for what?

A. Building houses and finishing up houses.

Q. Where?

A. That was out about Ellen Grove.

Q. Who is William T. Rainey?

A. He is a son of W. J. Rainey, I believe.

Q. And this material was for W. J. Rainey's houses there at that point you speak of?

A. I don't know whether the houses belong to W. J. Rainey or not; W. T. paid the bill.

Q. You were not inside this house?

A. No, sir.

Q. Did you measure the size of the lot the house stands on?

A. No, sir; I didn't.

Q. Did you ever buy and sell any real estate in this immediate neighborhood of the Herberts there?

A. No, sir.

256 Q. Then your estimate of $828.41 for building a house such as you assume this to be, is based upon information that you have received from others, or that you assume, in regard to the inside construction of the house, largely, isn't it?

A. No, sir.

Q. Isn't it based, to some extent, on what you have learned from others as to the inside construction of the house?

A. No, sir; I made the estimate as I would make it on a new house, with two coats of plastering and the ceilings white-coated; the house to be a studded, frame house and an open srairway in it, with rail and baluster and newel post. I made it in that way.

Q. But you assumed this to be that kind of a house?

A. I didn't assume this, because we couldn't get any information as to it.

Q. Your estimate, then, is simply for a house that you assume to be a certain kind and dimensions, and not what you assume this house to be?

A. No, sir.

Redirect examination by Mr. SHIRAS:

Q. In your estimate of this house, you estimated upon one of the same exterior dimensions, and with the interior as you have described?

A. Yes, sir. I wish to state here that there is a back building to this house that I counted in.

Q. Then, in your estimate, you also included, one of the out-buildings?

A. I include the "L" to this house, that is 18 feet long, 16 feet wide and 10 feet high. That is attached to the main building and included in the estimate.

Recross-examination by Mr. GARRISON:

Q. How did you get the measurements of that back building?

257 A. Well, I made them from my eye.

Q. You didn't measure that?

A. I didn't measure, with a rule nor a line; that is, the back building.

Q. Did you measure the main building with a rule or measure?

A. I measured it with a tape-line.

Q. You measured the length of the main building, did you?
A. Yes, sir.
Q. And did you measure the width of it?
A. Yes, sir.
Q. Did you measure the height?
A. I counted the height.
Q. How?
A. By the weather-boarding; I measured the weather-boarding and counted the weather-boarding.

By Mr. DICKEY:

Q. When you testified that you had made an estimate of the cost of a new house of similar character, did you make that estimate in writing?
A. Yes, sir.
Q. And is this the estimate that you have prepared, showing an itemized statement of the cost of construction?

(Paper handed to witness.)

A. Yes, sir.

Counsel for defense offer in evidence the statement in question, the same being marked as Exhibit "B."
No objection.

AARON J. FAIRCHILD, sworn on behalf of defendant.

258 Direct examination by Mr. SHIRAS:

Q. Where do you reside?
A. I reside near East Liberty; the post office is Vanderbilt, Dunbar township.
Q. How long have you resided there?
A. I have resided there in East Liberty for forty years.
Q. How far is that from the Herbert premises?
A. That is about, possibly, one and a quarter miles.
Q. Do you know the property of the Messrs. Herbert, the plaintiffs in the case?
A. Yes, sir.
Q. How long have you known that property?
A. I have known the property for about twenty two or three years, at least. I have also known the place upon which the property is situated for a longer time than that; ever since I was a boy.
Q. What is your occupation?
A. My occupation is carpenter; occasionally I contract, and sometimes I subcontract, to some extent.
Q. How long have you followed your business of carpenter and contractor?
A. Since I began to learn the trade, I believe it is about twenty-three years.
Q. Are you now so engaged—is that your present occupation?
A. Yes, sir.

Q. Have you been engaged in the erection and construction of buildings somewhat similar in character to the Herbert house?

A. I have erected buildings of the same size, or nearly the same size; don't know that I could say I have erected buildings of the same character. I have something to do with repairing buildings also, but don't know that they would be just of the same size as that.

Q. You have built some that are smaller?

259 A. Yes, sir.

Q. And some that are larger?

A. And some that are larger; I have built some of very nearly the same size, with the exception of the kitchen; and I have built some of very nearly the same size with the kitchen, also.

Q. From your experience in building, are you able to give the cost and value of houses and buildings of this character?

A. Well, I could give it from my own experience, and from the information given me by the owner of a house that I built last spring that was very nearly the size of this house; the wing is two feet shorter; the house contains, though, a veranda which is larger; the veranda on the new house is 22 x 8, while on this Herbert house the veranda is 6 ft. 2 in. by 10 ft. 4 in.

Q. Are you familiar with the Herbert house to such an extent—that is, by measurements and examination—as to be prepared to give an estimate of the cost of its erection and the cost of the erection of a new house somewhat similar in character?

A. No, sir.

Q. Did you make the measurements of the house?

A. I measured the exterior of the house.

Q. I don't know that you understood my question. From your experience as a builder and contractor, are you able to state what, in your judgment, it would cost to erect a house similar to that of the Herberts?

A. To erect a new house, you mean?

Q. Yes.

A. Well, I could answer that question by allowing me to make some explanation—some points that I know nothing about on that house. With regard to the interior of the house, I would have to explain that matter, because I didn't see the interior of the house and know nothing about it, except from hearsay. I made an estimate on building a house similar to that in size, and building a new house and finishing it in a certain manner.

260 Q. Why is it you made no examination of the interior, in order to give your estimate?

A. In the first place, when I went there to measure the house, Mrs. Herbert told me I couldn't see the house unless the boys consented, and the boys being at work in the pit—she told me where they were, and I went up and waited till one of them came out, and he told me he would be down about four o'clock; that was George. I went down to the house then, but George didn't come down; Thomas came down somewhere near that time, and he told me that I could measure the house; and I measured the outside of the

house, and made my notes; and then he said he didn't know that it was worth while for me to go inside; he said he could tell me what the interior of the house consisted of; and I thought that would be sufficient; I didn't expect to be questioned in anything of this kind.

Q. Then, in your estimate of the house, you relied for your estimate upon the interior on the description given by one of the plaintiffs in this case?

A. No, I don't. The plaintiff gave me a description of that house, but I made my estimate from instructions given me by Mr. Skelly. He sent me there to measure the house; told me to make an estimate on building a new house after that model, as nearly as possible; and I got this information from Mr. Herbert about the interior of the house, and that's the reason I didn't consider it imperatively necessary to see the interior of the house; I only wanted the general arrangement.

Q. Then, from Mr. Herbert, you learned the number of rooms in the house?

A. Yes, sir.

Q. What did he tell you with regard to the inside?

A. He told me that the cellar was fitted up as a basement and had a stove in it, and a flue down in the basement; had a stove in one of the rooms; and there was also a break in the wall of that
261 basement that the dirt had been dug out, in partially under the wing, under the kitchen part—dug out some little distance from the wall; the dirt was dug down to make a small cellar-way back in there. Then he told me that the main part of the house had two rooms below and two rooms above; one room below having the stairway in it, being an open stairway without a rail put on yet; the stairway was just simply in one end of the room; it hadn't a partition to make a hall for the stairway; it was just in one room; and the front door opened into that room. And he told me that the kitchen was a wing, which I could see from the outside; an "L," built back of the room that didn't contain the stairway, if I understood him right. That stairway was in the room foremost of the kitchen part—that is, was below the kitchen part—wasn't covered by the kitchen part joining the back of it. And he told me that it was studded and plastered on the inside and had no cupboards in it, built in the house. There was two chimneys in the main building, one having three flues—well, now, I couldn't say he told me one had three flues, either—but each had two flues, at least; one had a fireplace below and a stove above, and the other—I don't remember whether he said had a fireplace on both floors, or not—that is, had a fireplace on both floors, or not; but they had fireplaces if I remember rightly. I believe that is about the amount. Then the kitchen part had a terra-cotta pipe.

Q. Was there anything said about the painting inside?

A. I believe that he did state that it had two coats of paint on the inside; I think so.

Q. Since that examination was made, have you attempted to make an examination of the interior?

A. I went there just after I was here—the next day after I was here at the court, when the other witnesses was examined. According to the agreement that was made here, I went there to examine the house, but was not allowed to enter.

Q. You asked for admission, did you?

262 A. Yes; I asked admission. I asked if the boys were there; it was Mrs. Herbert came to the door, and she said they were not. I asked her then if they had told her anything about the agreement that was made here in this room, with regard to the witnesses that weren't examined yet here seeing the interior of the house. And she answered me, and told me to just get right out of there; that I had no business there. If anything further than that is wanted with regard to that talk, I have a little description of the conversation that I made out, which I think I can say is verbatim.

Q. You might say what you have there entered as to the conversation.

A. It was made the same evening.

Q. State all the conversation that occurred there.

A. I haven't all the conversation.

Q. All that you remember.

A. I could have put more upon the paper, could have remembered more at that time; this is what might be called the salient points of it.

Q. State all you remember; you can use the paper to refresh your memory.

Mr. GARRISON;

Q. Were either Thomas or George Herbert present?

A. No, sir; neither of the boys were there, so far as I know.

Counsel for plaintiffs objects to the witness stating any conversation that did not take place in the presence of the plaintiffs.

A. I went to the gate, and in through the gate to the door and knocked, and I heard a sort of bustle inside of the house at the time, and heard some one say something like "Here he comes again," or something of that kind; that was very indistinct, and I

263 couldn't say that was what was said. I knocked and Mrs. Herbert came to the door, and I asked her if the boys were at home, and she replied, very shortly, "No." I then began to ask her if they had informed her of the agreement between counsel here in Pittsburg to allow the witnesses to examine the interior work of the house, but I didn't get further than seven words. That was the question that I intended to ask her, but didn't get further than seven words on the question, when she broke out in about the following language—well, I might say, the following language; I put it here "about," because I thought perhaps I couldn't just exactly remember, but I think I can be qualified that I remember the language: "You just get right out of here, just as fast as you can go, or I will have you arrested for coming here to annoy and worry me." When she paused, I attempted to tell her that I was there in her interest, rather than some one else's; but she wouldn't hear, and grew

more insulting than ever. Told me I had no business about her house; if they wanted to see her house, why didn't Mitchell or old Rainey come themselves—but that I had better stay away from there, or I would get into trouble, and that I would better get right out of there, with much more of the same kind. Finding that I could do no good there, I bade her good evening and quietly walked away.

Q. Taking into consideration the statements made by Thomas Herbert with regard to the interior of this house, and the measurements that you have made, are you prepared to state what a new house of this character would cost?

A. I am prepared to state just exactly what I put a bid in for the new house to Mr. Mitchell. That is, what I agreed to build a new house for.

Q. When you say to Mr. Mitchell, do you mean to him specially?

A. I put it in to him, or any one, the superintendent of Rainey's works there, who would want me to build the house.

264 Mr. GARRISON: It strikes me that he has not shown that he is able to make an estimate on this house.

A. I wasn't sent there to make an estimate on this house, but on another house which was to be built after that house.

Mr. SHIRAS:

Q. Please state what it would cost to build such a house.

A. I made a bid to Mr. Mitchell at $840.00.

Q. How old is the Herbert house, about?

A. I would say the house is 21 years old, at least; I don't know exactly whether that is the exact case or not.

Q. Then this estimate you give is for a new house?

A. Yes, sir.

Q. And would that house be more valuable than the Herbert house, considering its age?

A. I would consider it considerably more valuable.

Q. What would be the depreciation in the old house, in your judgment, as against the new house similar to that?

A. Well, if the old house is inside just as it was represented to me, I would make a depreciation of 30 per cent. at least.

Q. You made outside measurements of this house, did you?

A. Yes, sir.

Q. What were the dimensions? Describe fully everything you saw about the house.

A. First the main building. I will give the measurements now over the weather-boarding, outside of the weather-boarding. I measured 32 feet 4 inches; width 16 feet 4 inches; height 16 feet 4 inches; basement height—that is, height of basement wall—6 feet 6 inches; for two basement windows 12 x 14 inch glass; one beaton door; veranda, 6 feet 2 inches by 10 feet 4 inches, with eight
265 posts; the height I don't know, as it was up from the ground considerable; it was up above the wall, and the wall was 6 feet 6 inches underneath it.

Q. About what was the height of the veranda?

A. I would take it, from ceiling to floor, to be about eight and one-half feet.

Q. Go on.

A. The veranda has a tin roof. The kitchen, the length is 18 feet 4 inches; width, 16 feet 5 inches; height, 9 feet 9 inches. With regard to the main building again, the front door had side lights and transom, the same as a hall door usually has or sometimes has. There are twelve windows; three of them with 9 x 12 glass, and 9 of them with 24 x 28 glass; back door in main house is 6 feet 8 inches by 2 feet 8 inches, with five panels. The kitchen door is 6 feet 8 inches by 2 feet 8 inches, and is a panelled door, I guess. Terra-cotta pipe in the kitchen for stove flue; in basement, one grate—no, a stove flue; that is what Thomas told me; one grate down-stairs and one grate upstairs; that is, in the main building; with one grate down-stairs, and one stove upstairs; that is, in the other end, in the other room. Upstairs and down-stairs rooms in one end both had grates, and in the other end one had a stove and one had a grate. With regard to the flue down in the basement, I have a description of it from the man that built it; he told me that flue was put in there.

Q. When you state that you made a bid for a new house of this character, would that be the market price?

A. That would be the price that I could build it for, buying my lumber from our local lumber dealers in that section there; buying the lumber at as good rates as I could get. I also added ten per cent. upon what I figured the exact cost for contractor's profit.

Mr. DICKEY:

Q You say you could build it for that. Would you have any advantages over any other contractor or builder?

266 A. There are other contractors in that country that could build the house for less money than me. I mean that I could build it for that.

Mr. SHIRAS:

Q. And this sum includes ten per cent. for the contractor's profit?

A. Yes, sir. I will state that there is a few cents in my estimate that is disregarded. I made it just the even dollars in making my bid.

Mr. DICKEY:

Q. Is ten per cent. the ordinary profit figured in the market on a house of this kind?

A. I don't think it is.

Q. What is the ordinary profit?

A. I couldn't say. I wouldn't like to be qualified to the ordinary contractor's profit that is given in the market.

Q. Could you tell us about what it is?

A. I had a statement from one firm of contractors that they allow twenty per cent.; but only from one firm, and I don't know what the ordinary contractor's allowance is.

Mr. SHIRAS:

Q. You say you have been acquainted with the property upon which the Herbert house is built, even before the erection of that house?

A. Yes, sir.

Q. And you have lived in that neighborhood ever since the erection of the house?

A. Well, I was in Iowa a short time, somewhere near the time that house was built, and perhaps at the time the house was built; but I saw the house after I came back from Iowa. I was
267 out there from, I suppose, five or six months. And then I was in Oregon some ten years ago, I reckon; I staid there three years. That's about all the absences I have had from the country.

Q. Well, then, between the period that this house was erected, down to 1880, say, the time it is alleged that Mr. Rainey acquired the property, did you ever hear any mention of the town of Sedgwick, or did you have any knowledge of that town?

A. No, sir; I had no knowledge of the town of Sedgwick. If I had at the time it has escaped my memory.

Q. Then, the only time that you have any recollection of having heard of this town was when?

A. The first time, I believe, that I heard it mentioned, it was mentioned up there by a man by the name of Kimmel, that gave me the information about when this flue was built; he told me about the town of Sedgwick having been laid out there, but it was only from his information that I heard anything about that.

Q. When was that?

A. That he said the town was laid out?

Q. When did he speak to you about it? When was this conversation?

A. It was about two weeks, I believe before the trial was here, when I was down before.

Q. Then, the only time that you have heard this alleged town spoken of has been since the litigation was commenced?

A. Yes, sir.

Q. And during all this period that you have lived there, you have no recollection of having heard of this town having been laid out, except as you have said?

A. No, sir; that is all. I heard it mentioned here, of course.

Q. How long have you lived in that neighborhood?

A. I have lived there forty years; was born in the neighborhood, and have lived there with the exception of those absences that I spoke of; but when I was in Oregon my family was in the same neighborhood; I wasn't married when I was in Iowa.

268 Q. Do you own any property there?

A. Yes, sir.

Q. How far from the Herbert house?

A. About a mile and a quarter, I believe; maybe a little more.

Q. Have you any general knowledge of the value of real estate,

such as would lead you to place any estimate upon the value of the lot upon which the Herbert house is erected?

Q. Do you mean the value for building purposes, or for agricultural purposes, or for what purpose?

A. The market value—just the ordinary market value of a lot of this size in that locality?

A. That would be what would be called a building lot, then; is that what you mean?

Mr. DICKEY:

Q. Can you give an estimate of what the Herbert ground would sell for, at a fair market value? What would it bring in the market at a fair sale, not counting the house—what would the ground as it stands bring, at a fair sale in the market?

A. That is rather a puzzling question to me; if it were for agricultural purposes, it would be very different from what it would be just as a lot for a home to live on.

Mr. SHIRAS:

Q. What would it be worth for agricultural purposes?

A. Well, with regard to that especial lot, I can't say; if they have fertilized it very highly, it would be worth more than what I would place on immediately adjacent land. The immediately adjacent land is not worth very much for agricultural purposes, because it was exhausted years ago, as I know.

Q. Taking its value as a building lot, what would you say it was worth in that locality?

269 A. The lot, being about a half acre, as I was informed it is, would be worth, say, $300. Well, I don't know; I will have to say a little less than $300. I couldn't say more than $250 in that locality. If it was in the town of Vanderbilt or in the town of Dawson it would be worth a little more.

Cross-examination by Mr. GARRISON:

Q. What are you engaged in now?

A. I am carpentering now.

Q. Working by the day?

A. Yes, sir; by the day.

Q. Who are you working for?

A. Well, I hired with Mr. John H. Skelly, who is, I understand, the boss carpenter for W. J. Rainey.

Q. And it was at the instance of Mr. Skelly that you made an estimate on a certain kind of a house that he told you to make an estimate and bid upon?

A. Yes, sir.

Q. And you made your estimate upon such a house as was described to you by Mr. Skelly?

A. I made my estimate upon such a house as Mr. Skelly—he told me to go and see the house and make my estimate upon a new house of such form as that house was and finished with two coats of

plastering and a white coat inside, and, of course, a studded house with weather-boarding on, such as is usually built.

Q. What is Mr. Skelly's business?

A. At present he is engaged as the boss of the carpenters for Mr. Rainey, I believe.

Q. And are you working under him?

A. Yes, sir; I am.

Q. Did you ever do any contracting?

A. Yes, sir; I have done some contracting.

Q. How long ago?

A. Well, I done some contracting about five years ago, I believe; I have not done any very lately.

270 Q. Build any house by contract?

A. I built one house by contract at that time.

Q. You say you went in the first place, at the instance of Mr. Skelly, to make measurements of this Herbert property, and to make an estimate on what a new house would cost such as this property. Did he give you figures to go according to?

A. No, sir; no figures.

Q. Did he give you any written instructions?

A. No, sir; no written instructions.

Q. Then you went there and made these measurements and had this conversation with Thomas Herbert—he was there the first time you went?

A. Yes; he came there after I had been up to the pit to see him.

Q. Then you returned again to the Herbert property, did you?

A. I returned according to the agreement that was made in court here.

Q. Who sent you there on that occasion?

A. The court here—the agreement.

Q. Didn't Mr. Skelly send you there?

A. No, sir.

Q. Did you ever have any conversation with Mr. Skelly about going there the second time?

A. I told him when I came back, but not before I went.

Q. How long after the hearing here was it until you went the second time?

A. The hearing here I believe was on Friday, and I went there on Saturday, I believe, at four o'clock.

Q. Then you met a lady there, the mother of George and Thomas Herbert?

A. I believe so.

Q. An old woman?

A. Yes, sir.

Q. She met you at the door?

271 A. Yes, sir; came to the door in response to my knock.

Q. What did you say to her?

A. I asked her first if the boys were at home, and she said no. I then began to ask her if they had informed her anything about the agreement that was made here in the court-room at the time of the trial the day before, with regard to the witnesses that hadn't

been examined being allowed to see the interior of the house; but I didn't get to ask her very much.

Q. What did she reply to that?

A. She told me to get right out of there.

Q. Did she offer any violence?

A. No; she threatened me with prosecution.

Q. Didn't attempt to strike you?

A. No, sir.

Q. But she replied to you that Mr. Rainey himself had better come, or Mr. who else?

A. She said if they wanted to see the interior of the house, why didn't Mitchell or old Rainey come themselves.

Q. And you told her that you were there as much in her interest as anybody else's?

A. I told her I was there more in her interest than anybody else's.

Q. You told her that the court had sent you there, in the trial of this case?

A. I began to ask her that, but I don't think she allowed it to go that far. I only got about some seven words of the question out, I think, until she broke in upon my information and didn't allow me to go any further. I don't know whether she got the full meaning of that talk or not. I don't suppose she did.

Q. And then you walked away?

A. Yes, sir; I turned around and walked away.

Q. Didn't get to see in the house at all?

A. Well, I got to see one edge of the door, one edge of the door frame.

Q. You didn't take any memorandum of that?

272 A. No, sir; but I know what the frame looked like; but I will say too, if you wish to hear it, that the frame didn't indicate that the kitchen part was studded.

Q. You made no inquiry of the old lady about the interior structure of the house, did you?

A. Certainly not.

Q. Is she an elderly woman?

A. Yes, sir; she is a woman of some age.

Q. Have you ever bought and sold any houses and lots around that neighborhood, like this?

A. I don't know that I have bought any just like this; but I have bought and sold some.

Q. Where were they situated?

A. Situated in East Liberty, about a mile and a quarter from there.

Q. How many houses did you buy and sell down there?

A. I bought two in East Liberty.

Q. How long ago was that?

A. I bought one in East Liberty about eighteen years ago, I reckon.

Q. When did you buy the other?

A. I bought the other about ten years ago; between nine and ten

years; and I have also, since then, bought a lot and built one. I sold the last one and bought a lot and built one there for myself.

Q. You have never dealt in real estate?

A. No, sir; not as a dealer in real estate; that is, further than buying land for myself.

Q. Did you ever buy any for farming purposes?

A. Well, where I bought now I bought about an acre and a half, when I first built the house, and then I bought just about four acres; I have six acres and eighty-four perches.

Q. Then, the value of $250 that you place on this lot is the lot without any improvements, fences, or any fruit trees, or anything else on it?

A. Just simply as a building lot.

273 Q. Without any improvements. When did you make that memorandum that you made and have testified from here?

A. What do you refer to?

Q. This memorandum as to the language used by Mrs. Herbert.

A. I made that immediately after I got home, after the language occurred.

Q. You sat down and wrote it out and rewrote it and saw that it was in proper shape, did you?

A. I didn't rewrite it; I just sat down and wrote it.

Q. Were you instructed to go up there to ascertain whether they would let you in, or not, and make a memorandum of it, and all that?

A. No, sir; I did that on my own account. All the instructions I got was from the agreement in court here.

Q. You say you had a talk first with Mr. Kimmel about the town of Sedgwick?

A. No; I said I had a talk, about two weeks, I believe, before I came down here, about this property. He was telling me he had built the wall under the house there and had afterwards made that flue, and he was describing about it to me.

Q. What did he say about the town of Sedgwick?

A. Well, he said the town of Sedgwick was laid out there by the Youghiogheny River Oil Company, and a lot was sold to a man by the name of Dean; he was called there, so Mr. Kimmel said, "Boss" Dean. I believe he was boss on the railroad; and he built the house, or partly built it, and then sold the house to Mr. Cochran, so he said, for $300. And he put a wall under it for Mr. Cochran.

Q. Now, in making your estimate, you didn't take into consideration any special value that this property would have to these people as a residence, did you?

Objected to by counsel for defense, as generally irrelevant.

274 A. No, sir; I didn't take into consideration any special value there would be upon the premises to the persons that occupy it.

J. R. BALSLEY, recalled by defendant.

Direct examination by Mr. DICKEY:

Q. Mr. Balsley have you heard the testimony of Mr. Fairchild, given at this meeting?

A. I have.

Q. And have you heard the description of the insids of this house which he has testified to as related to him by Thomas Herbert?

A. Yes, sir.

Q. You have testified that you didn't go inside of the house?

A. No, sir; I didn't go in.

Q. Assuming that the interior of the house is as described in the testimony of Mr. Fairchild, as he says it was stated to him by Thomas Herbert, would or would not the estimate which you have testified to here as to the value of such a house be altered?

Objected to by counsel for plaintiffs, first, because it is leading, and, second, because the question is not in proper hypothetical form.

A. I would alter the figures that I have made.

Q. State what alteration it would make in the figures you have made.

A. It would make at least twenty dollars on the stairway; as I had counted the stairway with a rail and newel post and balusters.

Q. Do you mean the value of the house would be $20 more, or less?

275 A. $20 less. And I believe I counted four grates and mantles, and he says there's only three; that would make off of that another $10.00 less.

Q. From your examination of the house—from what you saw and the measurements you made, and assuming that the house has six rooms in it, two of those rooms being in the basement; that there is a kitchen in the "L;" that the house is studded; that it is plastered and painted; that there is no hall; that there are three open fire-places; that there is a stove in the cellar; that there is a pipe flue to the kitchen fire-place; that the stairway has no railing to it; that there are side lights to the front door and a transom over the front door; that there are no cupboards built in the house; the outside of the house as you have seen it, and the number of windows and doors as you have seen them, with a porch or veranda to the house—state what would be the fair market value of such a house as this.

A. Taking off the partition and the railing—do you mean for a new house?

Q. You can give the value either for a new house of the same kind, or for this house as it stands. If you give the value of a new house, then state whether there would be any difference between the value of the house as it stands and a new house, and, if so, how much difference?

A. I would make the value of a new house $784.41, and of the

house as it stands there now, I would make a reduction of twenty-five per cent.

Cross-examination by Mr. GARRISON:

Q. This estimate you have made within a few minutes; here at the hearing; within the last few minutes?

A. Yes; I just took off the items that he says are not in the house that I figured on.

Q. This estimate that you make is necessarily not a conclusive or accurate estimate of the value, is it?

276 A. It is just such an estimate as I make hundreds of to build houses by, as nearly as I can possibly tell.

Q. Then, if you were going to make an estimate to build a house by, and were told to build a house such as this Herbert house, would you be willing to make a bid upon such information as you have about the Herbert house?

A. Yes, sir; I could make a bid from that information, if it is correct.

Q. Wouldn't you necessarily, in making such a bid as that, make your estimate somewhat at random?

A. From the information I had.

Q. If you were going to bid upon a house like this Herbert house, and not go inside of it to examine it, wouldn't your estimate necessarily be to some extent guess-work?

A. Yes, sir; but I didn't make this estimate with any view of knowing what was inside of that house.

Hearing adjourned to meet on Monday, Feb. 7, 1892, at 10 o'clock a. m.

Hearings continued from time to time, until Friday, March 18, 1892.

Friday, March 18, 1892, parties met at the office of J. M. Garrison, Esq., at the hour of 11 o'clock a. m.

Present: J. M. Garrison, Esq., of counsel for plaintiffs, and Messrs. Geo. Shiras, 3d; and C. C. Dickey, of counsel for defendant.

H. C. MCCUNE, sworn on behalf of defendant.

Direct examination by Mr. SHIRAS:

Q. Where do you reside?

A. I live in Dawson, Fayette county.

Q. How long have you resided there?

277 A. Nineteen years.

Q. What is your business?

A. My principal business is flour and feed; am engaged in the mill business there.

Q. You are in the milling business?

A. Yes, sir.

Q. Are you acquainted with the property of the Herberts, the complainants in this case?

A. Yes, sir; I am.

Q. Have you had occasion, from time to time, to go by there?

A. Yes, sir.

Q. Has your business brought you in contact with the people of that community more or less?

A. Yes, sir; it has.

Q. Do you know of any town of Sedgwick to-day existing in the neighborhood of this property?

A. No, sir.

Q. During the nineteen years that you have resided there in that locality, have you had any personal knowledge of the laying out or building of any such town?

A. Only from hearsay.

Q. When was it you heard any talk at all about it?

A. About the time, I think, that Mr. Rainey bought that property, I understood there was some lots had been laid out there at one time.

Q. Who was it that told you this?

A. I think it was one of the Cochran men that was talking to me.

Q. Have you any recollection of any one else talking to you about that?

A. No, sir; I have not.

Q. Is there anything to-day to indicate the existence of a town, that is, streets, roads and alleys, and lots and houses?

A. No, sir; there isn't.

278 Q. During the period that you have known it, was there any visible indication of the existence of a town, that you have observed?

A. No, sir.

Q. Do you own property in that neighborhood?

A. Yes, sir.

Q. How close to the Herberts?

A. Within about fifty or sixty rods.

Q. How much do you own?

A. I bought about twenty acres last fall, lying between Dawson and that place there.

Q. Did you buy it for farming purposes, or for building houses?

A. I bought it with the intention of laying it off in building lots.

Q. How does it compare with the Herbert property?

A. I think it is equally as desirable, if not more so.

Q. How much did you pay an acre for this?

A. I paid $125 an acre.

Q. You say you have seen the house and lot of the Herberts from time to time?

A. Yes, sir; I have.

Q. Have you knowledge, attained by personal observation, of the purchase and sale of lots in that neighborhood, such as would give you an opportunity to state about what the general market value of a house and lot of this character is?

A. I believe I have.

Q. From your knowledge of the value of lots in that neighborhood, what would you say the lot of the Herberts is worth, excluding the house?

A. Excluding the house and the improvements that are on it, I would say $250 would be a fair price for it.

Q. Have you looked at the Herbert house from the outside?

A. Yes, sir.

Q. What kind of a house is it in appearance?

279 A. Oh, it is an ordinary frame house, probably 30 or 32 feet long.

Q. About how old is the house, from the time it was first built?

A. The house was there when I first came there to that neighborhood; it was then what we call a plank house, since that time it has been weather-boarded, and one coat of paint on it, I think.

Q. Then you knew the house before it was weather-boarded?

A. Yes, sir.

Q. What would you say that such a house, considering its size and location and general appearance and its age, would be worth in the market?

A. Do you mean what it would cost to put the house there, or what the property would be worth on the market?

Q. Well, you might answer, if you can, as to what it would cost to build such a house,—if you know.

A. $800 would be a liberal price, I think, for building it from the foundation up. I built about such a sized house as that, two years ago, and it cost me in the neighborhood of $800.

Q. What would you put the value of the house and improvements at?

A. $1,300 would be a liberal price for it.

Q. Would that include the out-buildings, fence, and orchard?

A. Yes, sir.

Cross-examination by Mr. GARRISON:

Q. How far did you say you live from Herberts'?

A. I live in Dawson. It is probably half a mile from their house.

Q. And you carry on a milling business?

A. Yes, sir.

Q. And supply flour and feed to persons in the neighborhood?

280 A. Yes, sir.

Q. Supply it to Mr. Rainey?

A. Sometimes I do.

Q. Sell to him flour and feed?

A. Occasionally only.

Q. Have you ever supplied the Herberts with feed and flour?

A. Yes, sir.

Q. Did you deliver it to them?

A. Yes, sir; had my team deliver it to them.

Q. Well, in driving in there, how did you get into the house?
A. I didn't deliver it myself; my teamster did; of late years he has had to go out what they call the Hulltown road.
Q. You have been around about the house there, you say?
A. Yes, sir; I have.
Q. What is there in front of the house?
A. I don't think there is any regularly laid out road there; they can drive down in front of it, or could before they commenced building those ovens there, and they can yet.
Q. You say there are some ovens there?
A. Some ovens on each side of the premises, I see.
Q. And with an opening in front of the house?
A. Yes, sir.
Q. About what is the width of that opening—the width of the opening in the ovens there?
A. It is probably 150 feet, I would judge.
Q. The opening is 150 feet?
A. Or maybe 200.
Q. Are they using the ovens on either side of that opening?
A. They are on what we call the upper side.
Q. On one side of the opening, there is a double line of coke ovens, isn't there—a double row of coke ovens?
A. I think not.
Q. You didn't observe, then, closely, how the ovens are located?
281 A. I think there is a double line of coke ovens they are burning there.
Q. There is not a single row of coke ovens on the other side?
A. I don't think they are burning them.
Q. Is there a double line of ovens on either side of this opening?
A. I think not.
Q. On which side of the house is it that they are operating the ovens?
A. On the east side of the house.
Q. That is the side of the house next to where the tipple is, is it?
A. Yes, sir.
Q. They are burning coke in them?
A. Yes, sir.
Q. What obstructions, if any, are there immediately in front of the building?
A. I think I noticed some stone piled there.
Q. Did you notice any excavating or building of foundations there for coke ovens?
A. In front of the building?
Q. Yes.
A. No, sir; I don't think I did.
Q. How were you there, on horseback or on foot, or in a buggy?
A. I passed along there yesterday on foot.
Q. Did you see the passage-way along the side of the house?
A. Yes, sir; on the west side of it there is a way of getting back and forward to a water trough.

Q. The lot is enclosed within a fence?
A. Yes, sir.
Q. And the house is flush with the boundary line on one side?
A. Yes, sir.
Q. Was there a passage-way in front of the house? You say there was along the side of the lot?
282 A. Yes, sir; there is a passage-way in front of the house.
Q. Were there any teams that passed through there?
A. Yes, sir; I remember distinctly just as I passed along there was a horse driven down with a cart of ashes.
Q. Did they drive through this opening in the ovens in front of the house?
A. Yes, sir.
Q. When was it you were there last?
A. Yesterday.
Q. And they were operating ovens there on one side?
A. Yes, sir.
Q. You didn't go in the house?
A. No, sir.
Q. Don't know what the finish is inside?
A. No, sir; I never was in the house.
Q. And made no measurements?
A. No, sir.
Q. You never were engaged in the lumber business, were you?
A. Yes, sir.
Q. Are you now engaged in it?
A. Yes, sir.
Q. Where?
A. In Somerset county.
Q. What branch of the lumber business?
A. Am engaged in the oak and hemlock business.
Q. It is simply sawing lumber in the woods, for market?
A. Yes, sir.
Q. You were never engaged in the building business, were you?
A. No, sir.
Q. You say you heard of the town of Sedgwick about the time Mr. Rainey bought there, and you heard it from Mr. Cochrane; what did he say about it?
A. He said there had been some lots laid out there at one time.
Q. How do you fix that about the time that Mr. Rainey bought?
283 A. About that time there was quite a contest between him and Mr. Cochrane in regard to this property that these people now own.
Q. Did that contest begin before or after Mr. Rainey bought?
A. It was at the time they bought; there was quite a squabble between the two parties, as to who would get it.
Q. That is, there was a fight between Cochrane and Rainey, as to which of them should become the owner of this property?
A. It appeared so.
Q. At about that time, you had the conversation with Mr. Coch-

rane, and he then called your attention to the fact that there was a town laid out there at one time?

A. Yes, sir.

Q. Was Mr. Rainey present?

A. No, sir.

Q. Did you ever talk to Mr. Rainey about it?

A. No, sir. I never did; and it was not with the Mr. Cochrane that bought the property, either; it was his brother.

Q. How many acres did you say you had bought there at $125 an acre, recently?

A. 20 acres.

Q. How long ago?

A. About six months ago.

Q. For the purpose of laying it off in lots?

A. Yes, sir.

Q. This 20 acres is adjoining the town of Dawson?

A. Yes, sir.

Q. And you intended it as a suburb to that town?

A. We expect to lay it off in lots there; yes, sir.

Q. Does it lie between this Herbert property and Dawson?

A. Yes, sir.

Q. Have you laid it off in lots yet?

A. No, sir.

Q. You intend to?

284 A. Yes, sir.

Q. Dawson is a pretty thriving town, isn't it?

A. Yes, sir.

Q. Have you made up your mind yet, as to your subdivision?

A. No, sir; we have not.

Q. Have you decided as to what you are going to sell your lots at?

A. No, sir.

Q. Well, about what would you expect lots there to sell at, in that subdivision, according to your knowledge of values in that community?

Counsel for the defendant objects to the question, unless it is definite, as to the length and width of the lots.

Q. Lots of the size of this Herbert lot.

A. We don't expect to lay it off in as large lots as that, when we do lay it off.

Q. Are you acquainted with the Herbert family?

A. Yes, sir.

Q. Do you know the old gentleman?

A. Yes, sir.

Q. And the old lady?

A. Yes, sir.

Q. What other inmate of the house have they there; does Thomas live with them?

A. I think he does.

Q. They are old people, the father and mother, are they?

A. Yes, sir.

Q. In making your estimate of the value of this property at $1,300, you took into consideration simply the market value of the property, as you understand value in that community to be?

A. Yes, sir.

Q. You didn't take into consideration anything else?

A. No, sir.

285 Q. How far is the nearest coke oven away from this Herbert house, as near as you can estimate it?

A. Why, I didn't pay particular attention to how far down they had their string built yesterday, when I was along there, but I would think 150 or, maybe, 175 feet.

Q. If these coke ovens should be closed up there in front of this property, and operated as they are now operating on one side, what would be the effect on the value of this property? Would it increase or diminish its value?

A. It would diminish its value, no doubt.

Q. Have you known any lots to be sold in Dawson lately, vacant lots?

A. Yes, sir; there was one about the center of the town sold a couple of months ago.

Q. What did it sell for?

A. $300.

Q. What was the size of it?

A. It was what is called a half lot; it was 36 feet front and 140 feet deep; about one-eight- of an acre.

Redirect examination by Mr. SHIRAS:

Q. When you state that you saw a wagon-load of ashes passing by in front of the Herbert house, do you know whose wagon that was?

A. It was a cart; it was Mr. Rainey's I presume.

Q. In regard to this lot that you last referred to, that was in the town of Dawson?

A. Yes, sir.

Q. And on one of the main streets?

A. Yes, sir; right in the heart of the town.

Q. Would that be more valuable, from its location than the Herbert property?

Van.

A. Yes, sir. Even in the west end of town, or what we call the lower end of the town, a lot adjoining property that I own

286 there was valued at $150, a quarter of an acre, some time ago.

Q. Then, the value of lots in Dawson cannot properly be compared with the Herbert property, as to value?

A. No; I don't think they could.

Mr. GARRISON:

Q. If this opening in front of the Herbert house there, in the

coke ovens should be closed up, would it be possible to live in the house as a dwelling?

A. I don't think it would; that is, for most of people, anyhow.

Mr. SHIRAS:

Q. You have testified that you are accustomed, from time to time, to send feed and flour into that neighborhood, in some instances to the Herberts themselves. When they ordered their goods to be sent, how did they order it?

A. Why, Mr. Herbert generally just left the order to send so much feed or flour up to his place; our driver knew very well where he lived.

Q. And did you ship feed and flour to other persons in that neighborhood?

A. Yes, sir.

Q. And how was that order to be sent?

A. It was generally ordered to be sent to their houses, if there was a stranger had come there and bought something, we generally asked him where he lived, and if he lived up in that neighborhood, he said up in Fayette.

Q. What was meant by Fayette?

A. The coke works up there.

Q. Did any one ever order it sent to the town of Sedgwick?

A. Not as I know of.

287 Mr. GARRISON:

Q. What is the name of the station there on the road, near Herberts'?

A. It is called Sedgwick.

Mr. SHIRAS:

Q. How far is that from the Herbert property?

A. Well, where the station was—I don't think there is any station there now; I think they have moved it up to what is called Jackson's mines; but where it was, I think it was in the neighborhood of forty rods.

SAMUEL H. DUSHANE, sworn on behalf of the defendant.

Direct examination by Mr. SHIRAS:

Q. Where do you reside?

A. Connellsville.

Q. How long have you lived there?

A. About twenty-five years.

Q. What business are you in?

A. Insurance and real estate.

Q. Are you acquainted with the Herbert property and property in that neighborhood?

A. Yes, sir; somewhat.

Q. Have you occasion to go up there?

A. Yes, sir; I have business in Dawson and Vanderbilt that takes me past there frequently.

Q. How long have you been accustomed to go to and fro between Dawson and Connellsville?

A. About four years.

Q. About how far is Connellsville from the Herbert property?

A. East Connellsville?

Q. Yes.

288 A. I should judge about four and a half or five miles.

Q. Are you acquainted with the business men in that community?

A. In Dawson?

Q. In Dawson and that community.

A. Yes, sir; a number of them.

Q. During the period in which you have lived in Connellsville and been accustomed to visit Dawson and the places adjacent to the Herbert property, have you ever heard of an alleged town of Sedgwick?

A. Never heard of it. I read of it some time ago, in reference to an action taken in court to restrain the building of coke ovens.

Q. Then, the first time you ever heard of this alleged town was at or about the time of the commencement of this litigation?

A. Yes, sir.

Q. How long have you been in the real-estate business?

A. Five years.

Q. Have you examined the property of the Herberts?

A. Yes, sir; externally.

Q. Have you, from your business, been able to obtain a knowledge of the values of houses and lots of the character of the complainants' in this case, the general market value?

A. Yes, sir; I have, in some ways. I am secretary of a building and loan association, and we have some loans placed around there.

Q. In the placing of these loans, is it customary for you to make an examination of the premises?

A. It is not customary for me, but I often do it, as the applicants frequently ask me to come and see it; but I get to see the reports, and, in fact, handle all the reports.

Q. From the knowledge you have had in this business, are you able to give what you consider, the market value of a house and lot here?

A. Yes, sir; I think I should be able to do that.

289 Q. As unaffected by the building of these coke ovens? The whole property as it stood before the coke ovens were there?

A. Without the coke plant there?

Q. No; but independent of the line of ovens that is projected in the immediate neighborhood of the house, but with the coke plant in the neighborhood?

A. I think I could.

Q. What would you give as the value of this house?

A. I think it would be worth from $1,050 to 1,100 dollars; I think that would be a good value for it.

Q. Is the value of the house increased or depreciated by this coking plant, independent of the line of ovens in front of the house?

A. I think it would be increased; it would make it more desirable for renting purposes, or for sale.

Cross-examination by Mr. GARRISON:

Q. When did you see this Herbert house?

A. In the latter part of January, or February; I don't remember exactly; that is, when I examined it; but I have seen it both before and since.

Q. Were you inside of the house?

A. No, sir.

Q. Did you make any measurement of the house?

A. Yes, sir.

Q. Did you measure the size of the house?

A. The main part of it.

Q. What do you call the main part of it?

A. The front part of the building measured 16 x 32.

Q. Did you measure anything but the front part of the building?

A. I don't think I did, accurately. I think I stepped off the distance, though; measured down the fence, the length of the back part.

Q. Measure the height of the house?

290 A. I think we did measure the first story.

Q. Who was with you?

A. A man by the name of Cox, from Connellsville.

Q. How did you come to go there?

A. Mr. Mitchell asked me to go there and see the property, and said it was going to be condemned, or was in litigation, or something of the kind.

Q. Said it was going to be condemned, did he?

A. I don't think he said that; he said some action had been taken, and he would like to have the value of it, as I was an experienced man.

Q. The lot was enclosed within a fence, was it?

A. Yes, sir.

Q. Any out-buildings on the lot?

A. Yes, sir.

Q. Any fruit trees on the lot?

A. Yes, sir.

Q. Does the house stand flush with the lot on one side?

A. In front?

Q. Yes.

A. Yes, sir.

Q. What was immediately in front of the house when you saw it last?

A. Nothing but space when I saw it.

Q. What was on either side of that space?

A. On one side of the house the lot extended quite a ways.
Q. I want to ask you if there are not coke ovens erected there?
A. Yes, sir; but not in front of the house.
Q. I say on each side of the space in front of the house?
A. Yes, sir; some distance from the house.
Q. Wasn't there a double line of coke ovens on one side of this space and a single line on the other side?
A. I don't remember exactly, but I think there was, probably a double line on one side.
Q. What obstructions are there immediately in front of the house?
291 A. I didn't see any.
Q. Didn't see any stone lying there, preparatory to making a foundation?
A. I don't know that I noticed particularly.
Q. Then, you didn't take particular notice of the surroundings?
A. Yes; I thought I did.
Q. Was there a passage-way through this space where teams travelled back and forth?
A. There was plenty of room there, I think; I had no trouble to get to the house.
Q. Were you in a buggy?
A. No; on foot.
Q. Did you see where teams had passed back and forth through that open space?
A. I can't say exactly; the ground was frozen.
Q. Now, lengthwise of the lot, on one side—was there a passage-way there?
A. I don't think it is fenced in there. I think teams could drive around there, if they wanted to.
Q. Did you see where teams had passed through there?
A. I didn't observe anything of that kind.
Q. Were they operating any of these coke ovens, when you were there?
A. Some of them.
Q. Making coke in them?
A. I judge that is what they were doing.
Q. If that space in front of the house should be closed up, what would be the effect on this property?

Objected to by counsel for defense.

A. Do you mean what would be the damage?
Q. No. The immediate effect on this property.
A. They would have to move the house away.
Q. Couldn't live in it?
A. Yes; they could live in it.
292 Q. Do you think it could be used as a dwelling, with comfort, with those coke ovens closed up?
A. That would depend entirely on how close they were to it.
Q. How close would the ovens come to the house if that space was closed up along the line of the other road?

A. I can't tell you that; it would be right close, though.

Q. Would it be 10 feet away?

A. I don't remember.

Q. Would it be more or less than 10 feet, according to your best judgment?

A. I don't remember, and I can't answer.

Q. If that line of coke ovens should be closed up there, so that it would come within a foot of the house, could the house be used and occupied as a residence, with comfort?

A. I don't think so.

Q. Then, when you say that the erection of those coke ovens there would increase the value of the property, what do you mean?

A. I mean that the house can be moved back on the lot, and rented for more money. Locating a plant of any kind increases the value of property.

Q. Then you think that the putting of this plant within a foot of this lot would increase the value of the property as a residence?

A. Yes, sir; I do.

Q. Would it increase the comfort of the property, as a residence?

A. No, sir.

Q. Would it not decrease the comfort of the property, as a residence?

A. I should think so.

Q. Why would it increase the rental value of it?

A. Because houses are more in demand where coke ovens are; for the same reason that a railroad running by, increases the value of property.

293 Q. Then, you think the erection of these coke ovens there would increase the value of this property?

A. Yes, sir.

Q. And it would increase it so it would be worth more than $1,050 or $1,100?

A. I didn't say that; I said it would increase the value of it.

Q. Didn't you give your estimate, as to the value of this property, as unaffected by those coke ovens, at $1,050 or $1,100?

A. No, sir; I said with the coke plant there.

Q. Then the estimate of $1,050 or $1,100, that you now put on the property, is an estimate increased by the increased value that would be given to it by the construction of these ovens?

A. Yes, sir.

Q. Then, if you said before that $1,050 or $1,100 was its value unaffected by these coke ovens, that was a mistake?

A. I didn't say that.

Q. But if you did say it?

A. If I said that, that would be wrong. The idea I got was, to give the value of the property with the coke plant there. I was interrupted, so as not to give it without the coke plant.

Q. You say you never heard of the town of Sedgwick until this litigation began?

A. No, sir; I never did.

Q. Do you know of a railroad station there by the name of Sedgwick?

A. I don't think I ever heard it called that, and I have traveled it pretty frequently, too.

Q. Did you ever buy and sell any real estate close to this Herbert property?

A. No, sir; I have taken mortgages around there, on property where loans were granted, in Dawson.

Q. How far away from this property?

A. From a quarter to half a mile.

294 Q. Did you ever insure any of Mr. Rainey's property in there?

A. No, sir.

Redirect examination by Mr. SHIRAS:

Q. When you gave your value for the Herbert house and lot at $1,050, as I understood you, it was in reference to the coking plant in the neighborhood, and not in reference to the line of ovens immediately in front of the house?

A. You understood me right.

Q. And am I to understand, in case no coking plant were there, you would not put the same value on the house?

A. I wouldn't put the same value on the land.

Q. Then, in case the line of ovens, as projected, is built, you have testified, I believe, that the lot itself would not be decreased in value, provided the house were removed to the rear?

A. Yes, sir.

Q. If that house were put on the rear of the lot, say some 200 feet from where the line of ovens is now projected, would it, or would it not, be habitable?

A. It would be habitable, yes, sir.

ARBA SHALLENBERGER, affirmed on behalf of the defendant,

Direct examination by Mr. SHIRAS:

Q. Where do you reside?

A. I reside in the neighborhood of Dawson.

Q. How long have you lived there?

A. I have been living there since 1853.

Q. What is your age?

A. 70 years.

Q. What has been your business recently?

A. Farming.

295 Q. Have you held any official position there in that community?

A. Why, yes; I have had a township office.

Q. What was it?

A. Assessor of the township.

Q. What township?

A. Lower Tyrone.

Q. Is that the township in which the property of the Herberts is located?

A. Yes, sir.

Q. When were you township assessor?

A. Why, the last three years, closing this spring.

Q. Did you make the last assessment of the Herbert property that has been made?

A. Yes, sir.

Q. In making these assessments upon property in that township, what has been the custom, as to value?

A. Well, my own judgment on that matter would be about two-thirds value on the property of the township, as it is estimated there. Property of this kind varies somewhat from farming property in the country; those small burgs and lots are often valued a good deal too low, and sometimes too high. It is hard to find just the line, but I think for most of the township, about a two-thirds value would represent the valuation.

Q. Do you own any real estate?

A. Yes, sir.

Q. Where do you own it?

A. Within two miles of this Fayette coal works.

Q. From the experience you have had in assessing property there, are you able to give what would be a fair market value for this house and lot, as it stands to-day, unaffected by the line of ovens in front of the house?

A. Well, I will exercise my own judgment on that; that would be as far as I can go.

Q. From the experience you have had in assessing the value of properties in that township, what would you say would be
296 a fair market value for this whole property, the house and lot, unaffected by the line of ovens in front of the house?

A. As a home, I would think it would be worth $900, or $1,000, to a man as a home. I place two values on property, the cost, the outlay you put on it, and when a man sets down making a life-home, why, the home part of it is worth about half. That is what I would place upon a home of that kind in that section.

Q. What was this property assessed at?

A. Heretofore it has been assessed at $360. Last fall, being triennial year, I looked at the old people and the surroundings, and I thought it was not in rotation with other property of the kind, and I made a reduction of $60; so it was assessed last year at $300.

Q. You say you have lived in the neighborhood of this property since 1853?

A. Yes, sir.

Q. During that period, down to the time of this litigation, were you personally acquainted with any town of Sedgwick?

A. No, sir.

Q. Had you ever heard of any such town of Sedgwick until the commencement of this litigation?

A. I hadn't.

Q. Did you ever know of any such town being on the assessment books of *of* the township or county?

A. The name, "Old Fayette coal works," was the name of the place merely; that was given to it when they first built the ovens there, before there was any house built there, and I never had an intimation of a town.

Q. Then, this tract of land has been known as the Fayette Coke Works tract, has it?

A. Yes, sir.

297 Cross-examination by Mr. GARRISON:

Q. Who owned this ground on which this Herbert house is built, before the Herberts owned it?

A. That is more than I can tell you.

Q. Do you recollect when Dean owned it?

A. No; I recollect when the Newmeyers owned it, and after that I can't tell into whose hands it passed.

Q. Do you recollect when the McCormicks owned it?

A. Yes, sir.

Q. Do you recollect when the oil company owned it?

A. Well, yes; I have some knowledge of that.

Q. How far did you live away from there, at the time the oil company owned it?

A. Two miles.

Q. Do you recollect when they purchased?

A. I have but very indistinct recollections of it. I mind it passed into other hands. It was willed to McCormick's wife, and then it passed into different hands.

Q. What did the oil company buy it for?

A. I don't know.

Q. Who operated there for the oil company at the time, who was their agent?

A. I can't tell you that. There had been a shaft sunk by some parties there in search of oil, but they failed, and I don't know who got it.

Q. Did you know anybody that was in charge there for the Youghiogheny Oil Company?

A. No, I didn't.

Q. Did they ever take any coal from under this land?

A. The oil company?

Q. Yes.

A. That's more than I can tell you.

Q. Do you know whether they ever built any on the land?

A. I don't know that they did.

298 Q. Do you recollect of their ever making any surveys there?

A. Any what?

Q. Making surveys on that ground?

A. No; I can't tell you anything about that business.

Q. Do you know whether they did, or not make any surveys there?

A. No, sir; I can't say that they did; or did not.

Q. You don't know?

A. I don't know.

Q. They may have made a survey and laid off a town there and you not have known it?

A. Yes, sir; living back where I do, my business didn't lead me along that road very often.

Q. When did you first hear of this town of Sedgwick?

A. That is only a few days ago.

Q. Wasn't there a station close to this Herbert property, that they called Sedgwick?

A. It was the station of Dawson.

Q. Do you recollect of a station there on the railroad that they used to call Sedgwick?

A. Yes; I recollect of that.

Q. How far is that from this Herbert house?

A. I suppose it was, maybe, a hundred rods; it was up the stream further; something like that.

Q. Do you know what gave it that name?

A. No. The first name given to the station was Strickler. Strickler owned a store there, and the station was called for him.

Q. Then they changed it to Sedgwick?

A. Yes, sir; and I don't know what that came from.

Q. When did you last see this property?

A. I saw it when I was assessing in September some time.

Q. Were you inside of the house?

A. Yes, sir.

Q. You say it is customary to assess land up there at about two-thirds of its value for taxation purposes?

299 A. The township would run about that.

Q. Do you know that the law requires you to asses- it at its actual value?

A. I know that, but it has not been conformed to; they are beginning now to try to get it worked up to that point.

Q. You never obeyed that instruction of the law, then, when you made your assessments, which required you to assess property at its actual value?

A. I never thought that I did, quite.

Q. You place the value of this property at $900 or $1,000, as estimate, and that, you say, as unaffected by these coke ovens in the immediate vicinity there?

A. Yes, sir.

Q. You have seen those ovens, have you?

A. Yes, sir.

Q. Were they in operation when you saw them?

A. Not the ovens in immediate proximity to the house; they had about a hundred in operation when I was assessing, and they didn't reach down quite that far.

Q. You say that in making your estimate of the value of a property, you take into consideration as about half its value, its use as a home. Now, do I understand you to say that this property, for any

other use than as a home, would not be worth more than the half of $900 or $1,000?

A. That would be about what I would reckon it. When I estimate a thing, I count the cost and outlay; that would represent the worth of a thing pretty closely. I didn't make any particular examination of it, but that's about the way I would estimate the matter.

Q. Who are the inmates there? You know the old man Herbert and his wife?

A. Yes, sir.

Q. Both old people?

A. Yes, sir.

Q. And in making your estimate, you didn't take into consideration anything else, except the market value of the property?

300 A. Yes, sir; understand me, I place two values on property.

Q. Give us the market value, instead of its value as a home.

A. That would be about the half of a thousand dollars.

Q. $500 would be its market value?

A. Yes, sir; I place the other half as a homestead.

Q. Do you know of any other lots in that immediate vicinity there, that have been sold within the last few years?

A. I don't believe I do.

Q. What would you estimate as the cost of this house, or the value of this house itself, outside of the lot?

A. Well, at about $400, I think.

Q. About $400 would be for the house?

A. I built a house for myself, a few years ago, a better one than that, and I know about what the outlay was.

Q. And what would you put the lot at?

A. That would necessarily come to $100.

Q. You wouldn't put the lot above $100?

A. There's a half an acre; I believe; I don't know just what is in it.

Q. Did you ever buy or sell any lots of this kind?

A. No, sir.

Q. You are a farmer?

A. Yes, sir; and am a mechanic; carpenter is my trade.

Q. You have not been in that business for some time?

A. No, sir.

Q. How long has it been since you quit the carpenter business?

A. Thirty years ago.

Q. Have you been engaged in the real-estate business at any time during that period?

A. No, sir.

Q. At the time you last saw this Herbert house, how close were these coke ovens to the house, as near as you recollect?

301 A. Well, they were pretty close; I don't know that I can give you anything like the correct distance. I would say that they were too close for comfort.

Q. There is an opening in the line of ovens immediately in front of the house?

A. Yes, sir.

Q. What obstructions were there on it?

A. There was a row of stones hauled and thrown along, and there had been some excavating done, I believe; I just took a bird's-eye view of it.

Q. From your recollection of the situation there, at the time you saw it, if that gap in front of the house should be closed up, so as to connect the two pieces of ovens on each side, how close would the line of ovens be to this house?

A. Well, I would say they would be but a few feet away.

Q. If they should close up that gap, and operate those ovens clear through there, what effect would it have on the value of this property?

A. I think it would destroy its value entirely.

PETER WHALEN, sworn on behalf of defendant.

Direct examination by Mr. SHIRAS:

Q. Where do you live?

A. I am living in Dawson now, sir.

Q. Where did you live prior to living in Dawson?

A. Why, I lived up Hickman's Run.

Q. How far is that from the Herbert property?

A. Not very far.

Q. About how far?

A. I could hardly likely tell, sir, but it's pretty close.

Q. Was it the next place to the Herberts?

A. Yes, sir, in the company's house, right opposite; as near as they are.

Q. What is your business?

302 A. Draw coke, sir, for my living.

Q. How long did you live next to the Herberts?

A. Well, it is five years yesterday since I moved to the hill place.

Q. When did you move away from there?

A. Pretty near three months ago.

Q. During the time you lived next to the Herberts, did you ever hear anything about this town of Sedgwick?

A. No, sir; I never heard a name while I was there, only Hickman's Run.

Q. Were they any streets in that neighborhood?

A. I don't know, sir; I didn't see any; I see the fields there at each side; there's a road there up back of the house.

Q. Were the fields you saw there about the house just open land?

A. Yes, sir; open at each side.

Cross-examination by Mr. GARRISON:

Q. How long have you been in this country?

A. I have been in this country since '62.

Q. Came from Ireland?

A. Came from England, but I belong to Ireland.

Q. What is the name of the town you lived in, before you moved to Dawson?

A. I never heard any name, only Hickman's Run; I lived right at the switch.

Q. Hickman's Run?

A. Yes, sir; going up to Jimtown.

Q. How far was that away from the Herbert house?

A. It ain't far, sir.

Q. About how far?

A. About the width of a 2 or 3 acre field maybe.

Q. You lived there about five years?

A. No; I didn't live in that house. It was five years yesterday, since I came to that hill first.

303 Q. How long did you live at Hickman's Run?

A. About three years, or more.

Q. And you moved away from there about three months ago, and moved to Dawson?

A. I did, sir.

Q. And you are living there yet?

A. Yes, sir.

Q. What is the size of the house you lived in at Hickman's Run?

A. Two rooms down, and a kitchen; and one upstairs.

Q. What size was your family?

A. Four or five of us.

Q. Your wife and four children?

A. Only two, and a grandchild.

Q. What is the size of your family now?

A. Four of us.

Q. Your wife and three children?

A. No, sir; my wife and two daughters and myself and a son, and a grandchild.

Q. Where is your wife?

A. She is up at No. 3, at her daughter's.

Q. Do you own the property you live in?

A. No, sir.

Q. You are a coke-drawer. Do you work every day?

A. No; I lose some days; I work every day unless something happens.

Q. Do you recollect a station there on the railroad that used to be called Sedgwick?

A. Yes, sir; I seen the station there.

Q. What was it called?

A. I guess that's the name.

Q. Sedgwick?

A. Yes, sir.

Q. Did you ever go around over this ground to see whether there are stakes there, indicating streets and alleys?

A. No, sir.

304 Q. You saw this Herbert house there, with a fence around the lot?

A. Yes, sir.

Q. And there is a passage-way on one side of the house, lengthwise of the house—an open space there?

A. It is open on both sides.

Q. Teams pass up and down each way?

A. Yes, sir.

Q. And wagons?

A. Yes, sir.

Q. How do the Herberts get into their house?

A. They go up the railroad and go in, or come down the plank road and come in.

Q. They come in at the side of the lot from this place?

A. Yes, sir.

Q. And they can also come out in front of the house?

A. Yes, sir.

Hearing adjourned, by counsel for defense, until Thursday, March 24th, 1892, at 10 o'clock a. m.

Counsel for plaintiffs objects to a further adjournment.

Counsel for defendant states that they have a number of additional witnesses, all of whom must be brought here from Fayette county, and that it will be impossible for them, with due diligence, to procure the attendance of the witnesses before Thursday, March 24th.

And now, to wit, Thursday, March 24, 1892, parties met, pursuant to adjournment at usual place, and hour of 10 a. m.

Present: Judge Edward Campbell, of counsel for plaintiffs, and Messrs. C. C. Dickey and Geo. Shiras, 3d, of counsel for defendant.

305 JAMES M. CAVENDER sworn on behalf of defense.

Direct examination by Mr. SHIRAS:

Q. Where do you reside?

A. In Connellsville.

Q. How long have you lived there?

A. About twenty years.

Q. What is your business?

A. Insurance and real-estate agent.

Q. Have you ever been on the premises of the Herberts, the complainants in this case?

A. Yes, sir.

Q. Have you been over and about there on numerous occasions, or not?

A. I have been past there quite often on the train; and then I was at this house once when I insured it for him.

Q. You placed an insurance on this house, did you, at the instance of the complainants?

—. ——.

Q. What was the amount of the insurance you insured that house for?

A. $500.

Q. You made an examination to some extent, for the purpose of determining its value?

A. Yes, sir.

Q. When you placed this insurance, did you consider it a partial insurance or a full insurance?

A. Well, we don't aim to insure to full value, of course, but I thought it very near as much insurance as ought to be carried on the premises at the time.

Q. In describing the location of this house in the policy, what location did you name?

A. I gave it near Hickman's Run Junction; that's the best description I could give of it.

Q. You didn't, then, place it as in the town of Sedgwick?

A. No, sir; I didn't know that it was in the town of Sedgwick.

306 Q. Was there anything said about the town of Sedgwick?

A. No, sir.

Q. When was it that this insurance was placed?

A. I am not sure, but about two years ago, I think; nearly two years.

Q. During your residence in that neighborhood, have you ever heard of an alleged town of Sedgwick?

A. No, sir. Not that I remember of.

Q. When you were on the premises, did you see any visible evidence that would indicate the existence of a town?

A. No, sir; I did not.

Cross-examination by Judge CAMPBELL:

Q. How far is this Herbert house from your place of business?

A. I would suppose it is about five miles; it is about a mile on the other side of Dawson, or nearly so; it is considered five or six miles to Dawson.

Q. At that time had you any other insurance in that neighborhood?

A. No, sir; there are very few houses around there, and I had no insurance around that way.

Q. Had you any in Dawson?

A. Lots of it.

Q. How far is that from Dawson?

A. Between about a mile and three-quarters.

Q. Did you make an actual examination of this property, at the time you made the insurance?

A. Yes, sir; I made a casual examination.

Q. You went on the ground?

A. Yes, sir; I was at the house.

Q. Had you ever been there before?

A. No, sir.

307 JOHN FOX, sworn on behalf of defendant:

Direct examination by Mr. SHIRAS:

Q. Where do you reside?
A. I live in Dawson.
Q. How long have you lived there?
A. A little over four years.
Q. How long have you resided in the county of Fayette?
A. About fourteen years, sir.
Q. Where else besides Dawson, did you live?
A. I lived in Dayton, sir.
Q. How far is that from Dawson?
A. About seven or seven and a half miles, sir.
Q. What is your present business?
A. I am foreman at Mr. Rainey's at present.
Q. How long have you been foreman?
A. Going on five years, sir, for Mr. Rainey.
Q. And during the time you were foreman, you resided at Dawson, did you?
A. Not altogether, sir; I lived at Dayton when I first went to work for him.
Q. Then, you have resided at Dawson, while you were foreman, for some four years?
A. Yes, sir.
Q. Does your occupation require you to be around about in the neighborhood of the property of the Herberts daily?
A. Yes, sir; for I work there.
Q. Did you superintend the building of the line of ovens that is projected so as to pass by the Herbert house?
A. Yes, sir.
Q. Can you state when you first began the erection of these ovens?
A. I can't exactly give the date.
Q. About the time of year?
A. It was last summer two years, ago; no, last summer year ago.
308 Q. Was the line for those ovens first surveyed?
A. Yes, sir.
Q. Then, as I understand you, it will be two years ago this summer that you first began the erection of this line of ovens?
A. Yes, sir; two years ago this coming summer.
Q. How close are the nearest ovens on either line to the house of complainants?
A. On the east side, I guess the closes oven that is in operation there is about a hundred and fifty feet.
Q. And on the west side?
A. On the west side we have none in operation there.
Q. Then, as I understand you, none of the ovens on the west side are in operation at all?
A. No, sir.
Q. And on the eastern side is the end oven in operation?
A. No, sir; the next one to it is—the next one to the end one.

Q. During the time that you have been acting as foreman there, did you ever hear the town of Sedgwick mentioned?

A. No, sir.

Q. At that time, or at the present time, is there any visible indication of a town there?

A. Not to my knowledge, sir, there ain't.

Q. In reaching the coke works property there what roads are used?

A. The road to the Rainey house is used; that is, the road that runs up at the upper side of Dawson into the works there.

Q. What was the name of that road?

A. I can't say exactly what name that was.

Q. It has been stated in evidence here that during the erection of these ovens the crossing was torn up at the railroad track by Mr. Rainey's employés. Have you any knowledge of that?

A. No, sir; I don't know anything about the crossing; there is a few little foot-paths along the bank there; I didn't see anything to indicate a crossing.

309 Q. Do you know of any houses in that neighborhood that are built within 150 feet of coke ovens in operation?

A. Yes, sir; there is one house there, owned by Mr. Rainey.

Q. Is it inhabited?

A. Yes, sir.

Q. Are you able to state, from your experience in the coke business, if the Herbert house were removed to the rear of the lot, some 200 feet away from the line of ovens, whether that house would be habitable and could be used for such purpose?

A. Oh, I guess I could, sir. There's houses about as near to the coke ovens.

Q. In other ovens in that neighborhood, do you know of houses within that distance?

A. Yes, sir.

Cross-examination by Judge CAMPBELL:

Q. Do you know of Mr. Rainey buying a lot of ground from Mr. Cochran above the Herbert lot?

A. No, sir.

Q. You say that you began the work of laying out these ovens two years ago, do you?

A. It will be two years this coming summer.

Q. What part of the summer?

A. It must be the latter part of August, maybe; July or August; I can't say the date exactly, although I could tell you if I had my book along.

Q. Did you begin laying out these ovens in August, 1890?

A. Yes, sir; I believe that was the time.

Q. And what did you do in August, 1890, towards building these ovens?

A. We done some grading there and cut down some brush and one thing and another; some bushes and one thing and another.

310 Q. Who did?
A. I did it, sir.
Q. Did anybody else work at it besides you?
A. Not at that time they didn't, sir.
Q. How long did you work at that?
A. Well, I have been working at it till here last fall—the latter part of the fall.
Q. Have you been working at these ovens from August, 1890, until last fall?
A. Not all the time, sir, I have not; I have worked in different places.
Q. Whereabouts was that brush that you cut?
A. It was on the east side of the works.
Q. How far from the Herbert house?
A. Well, I couldn't state exactly the distance, but I guess, maybe, it was about 600 feet, along there, at that time.
Q. In which direction?
A. The upper side of the house, up the river, east of the house.
Q. Did you do any work towards laying out these ovens in 1890, nearer to the Herbert house than where you cut that brush?
A. Yes, sir; I believe we did.
Q. How near to the Herbert house was the nearest work that you did in 1890?
A. Well, I can't say exactly the distance. I never measured the distance.
Q. State it to the best of your judgment.
A. I guess that I was about as close then to it—I did some work as close then to it as I did since.
Q. State the distance, to the best of your judgment.
A. Well, I suppose I done some work there within four hundred feet of his house at that time.
Q. Within four hundred feet?
A. Yes, sir.
Q. What kind of work did you do within 400 feet of the Herbert house in 1890?
311 A. I done some grading, sir.
Q. How many hands worked at that grading in August, 1890?
A. I can't tell you the number without my book.
Q. Did any other hands work there besides yourself?
A. I had a foreman with me part of the time.
Q. How many hands worked there in 1890, at this distance of 400 feet from the Herbert house?
A. Well, I can't state the number of men that worked there at the time without I had my book that I kept my time in. I couldn't keep it in my mind.
Q. Did you have anybody besides yourself?
A. A part of the time I had another foreman helping me.
Q. Do you know of any more that you had?
A. No, sir.
Q. And you say this work was grading?

A. Yes, sir.
Q. How much did you grade?
A. I suppose I graded within 300 feet of his house.
Q. How much ground did you take off in doing this grading?
A. How much ground?
Q. How much ground.
A. Do you mean the cutting?
Q. Yes.
A. Well, some places the cutting was, maybe, six feet, some places eight feet; it varied in different places.
Q. What was the deepest grade you made within three hundred feet of the Herbert house, in 1890?
A. I didn't do any grading at all within 300 feet of his house; our grade run out.
Q. At what distance from the Herbert house did the grade run out?
A. I suppose pretty nigh that distance.
Q. What distance?
A. Pretty nigh 300 feet.
Q. 300 feet to the east of the Herbert house?
312 A. Yes, sir; to the east and west both. I did no grading close to his house at all.
Q. Did you do any grading in 1890 to the west of the Herbert house?
A. Yes, sir.
Q. How near to the house?
A. That was about the same distance.
Q. Where was that grading done?
A. It was done to the west of his house, sir.
Q. How long did it take you to do that grading in 1890?
A. Well, I couldn't say exactly; I done work other places besides what I done there. I guess, maybe, I was some three or four months working there.
Q. In 1890?
A. Yes; maybe five months. I couldn't state exactly the time.
Q. You yourself and one other foreman?
A. I didn't have the other foreman all the time.
Q. When the other foreman was not there, you were there alone, were you?
A. Yes, sir; either alone, or with the other foreman all the time.
Q. Do you say that you worked constantly on that grading for three months?
A. Yes, sir; while the weather permitted.
Q. What width of ground did you grade off there?
A. That is, all through?
Q. At this point where you were working in 1890.
A. Well, I suppose, about sixty feet.
Q. Sixty feet wide?
A. Yes, sir.
Q. And what length in extent?

A. I suppose the whole length is about 800 feet; that is, as near as I can judge.

Q. From what point—between what points do you say it was 800 feet?

A. Within two hundred feet of his house on the east side.

313 Q. Whereabouts are the old ovens?

A. The old ovens are to the rear of that.

Q. Are they on the east of the Herbert house?

A. Yes, sir.

Q. What distance were they from the Herbert house?

A. I couldn't state the distance exactly.

Q. To the best of your judgment and knowledge?

A. Well, sir, I suppose in the neighborhood of four hundred or five hundred feet.

Q. The old ovens?

A. Yes, sir.

Q. Were those ovens in use when you first became superintendent for Mr. Rainey at that point?

A. No, sir; not at that point.

Q. Did you ever see those ovens in use?

A. Yes, sir.

Q. How long have they been abandoned?

A. I couldn't say how long.

Q. How long is it since you have seen them in use?

A. About eight years ago.

Q. Have you seen them in use since eight years ago?

A. I expect maybe I have, if I recollect right.

Q. State now the last time that you ever saw them in use.

A. I couldn't exactly state the time.

Q. Answer as near as you can the last time you ever saw them in use.

A. About eight years ago.

Q. You have not seen them in use since eight years ago?

A. They were in use, I suppose; but I didn't see them; my business didn't take me around there.

Q. Was any more work done toward the construction of those ovens except the grading, in 1890?

A. Yes, sir; we built some ovens there on the east side.

Q. Whereabouts?

A. On the east side of the Herbert place.

Q. How near to the Herbert house?

314 A. Oh, I guess within three hundred feet.

Q. How many ovens did you build?

A. I can't say how many ovens; we built the stone-work for the ovens; probably the ovens weren't completed that close, but we built the stone-work that close.

Q. How many?

A. I can't say.

Q. Did you build one?

A. Oh, yes.

Q. Did you build two?

A. Yes, sir.
Q. Tell us as near as you can.
A. I can't tell you without telling you a lie, and I don't want to tell you a lie.
Q. Did you build any number of ovens?
A. I suppose we have.
Q. And you can't say whether you built two ovens or twenty?
A. No, sir; I can't.
Q. It may have been as many as twenty?
A. No; I don't believe it was.
Q. Do you think it was as many as ten?
A. It might be.
Q. It might be ten?
A. It might be.
Q. Do you think you built ten ovens there in 1890?
A. I can't say now.
Q. It is only two years ago.
A. But I have had a good deal on my mind since then; I didn't keep any track of this thing.
Q. Were those ovens that you are now speaking of as having been built by you in 1890 finished?
A. No, sir.
Q. To what extent of completion did you push them?
A. In that time?
Q. Yes, sir.
A. Well, I may have built fifty there; I may have built sixty.
315 Q. Did you complete sixty?
A. No, sir.
Q. Whereabouts were those sixty ovens that you built in 1890?
A. To the upper side of the Herbert house.
Q. How near was the nearest of those sixty ovens to the Herbert house?
A. I couldn't tell you; I never measured the distance.
Q. Tell me, now, to the best of your judgment, from what you know of the premises there, about how far it is.
A. I couldn't state positively the distance, without measuring it, and I don't want to state.
Q. Do you think it is a hundred yards?
A. Oh, yes, sir.
Q. Isn't it two hundred?
A. It may be.
Q. Do you know the old Fayette coke works?
A. That's what they were called.
Q. They were the ovens of the old Fayette coke works?
A. Yes, sir; that was what they were called at the time.
Q. These ovens that you are talking about were built by the old Fayette coke works?
A. No, sir; these must be the new ones. The old Fayette coke works is done away with.

Q. I am trying to get you to say whereabouts these ovens that you built are.

A. They are on the same ground that the old Fayette coke ovens were built.

Q. And can't you say here now how far the old Fayette coke ovens were from the Herbert house?

A. Not without measuring the distance.

Q. You have been there every day for five years. Aren't you willing to say how far it is?

A. No, sir; I wouldn't.

Q. You haven't good judgment as to distances?

A. I believe I have.

316 Q. And yet you are not willing to give me a judgment of the distance of those old Fayette coke ovens?

A. No, sir; not without measuring.

Q. Have you measured all these distances that you have been giving your counsel and me?

A. Yes, sir; a portion of them I have.

Q. Did you do that lately?

A. Yes, sir; I did.

Q. How lately?

A. I couldn't say how lately; maybe, not later than two or three days ago; maybe not later than a day ago.

Q. Then you have been over the ground this week?

A. Yes, sir; I have, several times.

Q. Did you build the ovens that are now erected at this end of the Fayette coke ovens—that were erected there by Mr. Rainey last summer?

A. Yes, sir; I built them on both ends.

Q. Did you superintend the whole of the work?

A. Yes, sir.

Q. When did you begin the work of building that string of ovens?

A. I told you a few minutes ago that I couldn't state exactly when without having my time book along.

Q. And now, after thinking it over and being questioned about it, give me your judgment as to the time you began them.

A. I guess it must be either in July or August I started in there.

Q. July or August last?

A. Yes, sir.

Q. July or August last?

A. Yes, sir.

Q. When you started in to build those ovens, you built a good many all together?

A. Not when I started in; I increased them.

Q. How many had you when you started in?

A. Seven or eight.

317 Q. And how many had you when you finished?

A. I can't say exactly.

Q. More than seven or eight?

A. Maybe forty; from that to sixty.

Q. Had you done anything towards constructing these ovens, from the time that you graded the ground in 1890, to the time that you began to build them last summer?

A. Had I done anything outside of that work?

Q. Had you done anything at the work of building these ovens, from the summer of 1890, when you graded a part of the ground, to last summer when you built the ovens?

A. Yes, sir.

Q. What did you do between those two dates?

A. I worked at several other places at Mr. Rainey's work.

Q. I speak of the ground that you have now been speaking of, where you graded the land in 1890. I ask you if you did any other work on that ground, between August, 1890, and last summer when you built them?

A. Oh, yes, sir.

Q. What else did you do?

A. I laid some track there.

Q. When did you do that?

A. I done that last summer.

Q. What time in the summer?

A. Well, I guess it was along towards the latter part of the summer.

Q. Between the time when you graded the ground in 1890, and the time that you laid that track, did you do any other work on that spot?

A. Yes, sir.

Q. What else did you do?

A. I unloaded some material there.

Q. What material did you unload there?

A. Load of brick and stone.

Q. When did you do that?

A. During the time I was doing this work here.

318 Q. During the time you were doing the work this summer?

A. That was part of the work all along.

Q. I mean prior to that time, the summer of 1890, until the time you unloaded that material on the ground—did you do any work there?

A. Yes, sir.

Q. What did you do?

A. I built some ovens there.

Q. On that same ground where those ovens now stand?

A. No, sir.

Q. Will you understand me, that I mean on the spot of ground where this new string of ovens now stands? I am asking you about no other ovens on the ground at all. Do you understand me?

A. Yes, sir.

Q. What did you do on that spot between 1890, when you graded it, and last summer?

A. There was only three things I did to it: That was the building of the ovens, the grading and the filling, and I suppose I done a portion of each of them.

Q. What did you do between August, 1890, when you graded that ground partially——

A. I say I done a portion of each of these three things; that is, the grading, filling and building.

Q. What you mean by the building is the building of the ovens?

A. Yes, sir.

Q. What did you do of that building prior to last summer?

A. I told you I done a portion of all these things.

Q. What portion of these things did you do?

A. I done a portion of the filling and a portion of the grading and a portion of the building.

Q. What did you do then?

A. That is my answer.

319 Q. Do you say you have now given all the answer you can give me?

A. Yes, sir.

Q. You don't remember, then, any other item of work of any kind which you did on this ground where the ovens now stand from August, 1890, until last summer? You don't remember of any other item of work that you did there except what you have mentioned?

A. No, sir; except laying pipe.

Q. What is that?

A. That is laying pipe to the ovens.

Q. When did you do that?

A. At the same time.

Q. At what time?

A. At the same time I built these ovens.

Q. What time is that?

A. During the two summers.

Q. It didn't take you two summers to lay that pipe?

A. It took me two summers to build the ovens and do the grading and lay the pipe and everything that was to be done.

Q. You say you have been laying pipe for two summers?

A. Not all the time. I have got to lay the pipe just as I build the ovens.

Q. Did you lay any pipe prior to last summer?

A. Yes, sir.

Q. Where?

A. At the upper end of this string of ovens.

Q. How far from the Herbert house is that pipe that you laid before last summer?

A. I can't exactly state the distance; I suppose, maybe, about 600 or 700 feet.

Q. And how much pipe did you lay at that distance?

A. Maybe about 300 feet.

Q. When did you do that?

A. I done it at the same time; I done it with the other work.

320 Q. Did you lay any pipe in 1890?

A. Yes, sir.

Q. How much?

A. I guess all the pipe that I laid in that time was laid in that time.

Q. All the pipe that you laid in 1890 was laid in 1890; that is what you mean?

A. We laid it just as far as the ovens were built.

Q. What did you do in the summer of 1891 towards building these ovens?

A. I done the same kind of work that I done before. As I told you, I done grading, filling, and built the ovens.

Q. You did the grading in 1890?

A. Oh, no; we done that as we went along.

Q. Didn't do all the grading in 1890?

A. No, sir.

Q. Do you mean to say that you have been building this string of ovens now that extends from the old Fayette coke ovens down past the Herbert house—do you mean to say, or do you not, that you have been building those ovens there since August, 1890?

A. Not all the time.

Q. How many ovens are there from the old Fayette coke ovens down to below the Herbert house in this new string of ovens erected below the Herbert house—the new string of ovens built there this last summer?

A. That is in operation, you mean?

Q. How many ovens are there on the ground? I didn't ask you whether they are in operation or not.

A. About 180; I never counted them.

Q. From the old Fayette coke ovens now——

A. I mean in the whole string.

Q. About 180?

A. Would be when they are finished.

Q. Is it a double string of ovens?

A. Part of it is.

Q. There are 180 ovens there now?

321 A. Will be, when they are finished?

Q. *Of* much of that is double?

A. I suppose maybe fifty ovens—along there, is a double string.

Q. When did you begin laying the stone for the building of that string of 180? In the first place, did you lay the stone for the building of that string?

A. No, sir; I didn't.

Q. Did you superintend it?

A. Yes, sir.

Q. When did you begin to lay that stone?

A. I began in the latter part of the summer.

Q. Of what summer?

A. Of summer before last.

Q. Of 1890?

A. Yes, sir.

Q. And how many ovens did you lay the stone for in the summer of 1890?

A. I guess about fifty ovens; maybe fifty-five.
Q. On the upper end, the eastern end?
A. Yes, sir.
Q. Did you lay up stone for the foundation of fifty ovens in the summer of 1890?
A. I guess so.
Q. Do you swear that you did?
A. Yes, sir.
Q. And how much more did you do, besides laying the foundations in the summer of 1890?
A. I done a great deal more.
Q. What else?
A. I graded for these ovens, and I filled, and laid track and laid pipe.
Q. That you have already said. I don't want you to state anything that has been told us before.
A. I have told you the very same thing now that I told you at first, and you have already had me over it fifteen hundred times since then. You want me to tell what ain't so.
322 Q. If you will give me one answer that will contain some information, I will stop at that. Do you mean to say that you did anything more before laying the foundations?
A. I told you that I done the filling; I am answering your questions exactly.
Q. You laid the foundation, did you?
A. Of course I did.
Q. Did you build any of the superstructures?
A. Yes, sir.
Q. How much?
A. I told you about fifty.
Q. You completed fifty ovens in the summer of 1890?
A. Yes, sir.
Q. Where were you before you began service at this point with Mr. Rainey?
A. I lived in Layton, sir.
Q. How far is Layton from these ovens?
A. I would say it was about seven miles; maybe a little more; I never measured it.
Q. What was your occupation before you became superintendent for Mr. Rainey?
A. I have been foreman for the last thirty years, sir.

Recess taken until one o'clock p. m.

Col. A. J. HILL, sworn on behalf of defendant.

Direct examination by Mr. SHIRAS:

Q. Where do you reside?
A. I live in Dunbar township.
Q. That is in Fayette county?
A. Yes, sir.

Q. How far is this from the Herbert property?

A. My property is just immediately across the river from theirs, from the Fayette coal property and the Herbert property.

323 Q. How long have you resided there?

A. I have lived there all my lifetime, or from the time I was ten years old.

Q. That requires me to ask how old you are.

A. I am fifty-five.

Q. What is your occupation?

A. I am farming at present.

Q. What other occupation or business have you?

A. I was assistant superintendent for Mr. Rainey for a number of years, until lately.

Q. How long were you assistant superintendent for Mr. Rainey?

A. I began there with Mr. Rainey in the fall of 1879.

Q. From the year 1879 down to the present time, your business has been such as to have you in attendance at the works more or less all the time, has it?

A. Yes, sir; all the time; the greater part of that time I was the only superintendent there. Mr. Mitchell was situated in Cleveland, and I had during that time the work for Mr. Rainey in that section—all of his works.

Q. Before your connection with Mr. Rainey, do I understand that you had lived on adjoining premises with the Herberts previous to 1879?

A. Yes, sir.

Q. Previous to the purchase of this land by Mr. Rainey, or at that time, or immediately thereafter, did you have any knowledge of the laying out of a town alleged to be called Sedgwick?

A. No, sir; I never knew anything of any town being laid out there until recently.

Q. How recently?

A. Well, until after these proceedings were begun.

Q. Is there anything there, or was there at the time Mr. Rainey bought in 1879, that would indicate the existence of a town?

A. There was nothing that I could discern, with the excep-

324 tion of these two lots that were owned by Mr. Dean at that time, and two lots above that owned by Mr. Herbert, Mr. Henry Herbert, the father of the plaintiffs in this case, or his wife; I don't know which it was owned it; the Herbert family. That's all that I ever knew.

Q. You have heard most of the evidence in this case, so far as taken, have you not?

A. Yes, sir; I believe so; I have been present, I believe, at most of the hearings, or, in fact, at all of them.

Q. What houses, if any, are now erected upon what is alleged to be the site of this town of Sedgwick?

A. The only house that is on the site that they claim as the town is the Herbert house.

Q. How long has that been there?

A. Well, that house has been there a good while; it has been

there, I suppose, since 1870, I judge, or along about that time. I remember when the house was built there.

Q. What kind of land is it that surrounds the Herbert house?

A. The land for farming purposes would be of very poor quality, as far as that is concerned.

Q. I refer rather to the appearance of the land—is there anything there to indicate streets and alleys?

A. No, sir; it lies open. It has laid open for quite a number of years there, and people were traveling over it in their wagons, with the exception of those lots where the Herbert house is built, which has been fenced up.

Q. With the exception of the enclosed premises of the Herberts, then, I understand the land is open land?

A. Yes, sir; open land.

Q. Were there any roads in front of or behind the Herbert property, used for approaching the coke works by?

A. There used to be a road in front of the Herbert house, coming from Dawson; it came from Dawson and went up toward the Hickory-square church; that was a public road at one time, but it has been closed up for some years, or, rather obstructed by the railroads.

Q. How long has that road been in use?

325 A. That road has been in use for quite a number of years; been in use for a long time; since that time there has been a road laid out from Dawson going up over the hill above the railroad, and the old road coming up from Dawson has not been used for several years.

Q. Then the old road coming up from Dawson was changed, was it, when the railroad was constructed?

A. Yes; it has not been used for several years; the railroad laid their switches partly down on the road, and it has not been in use for several years. I don't know just how many years.

Q. Were you residing there in 1879, when Mr. Rainey bought the property?

A. Yes, sir.

Q. Did you have anything to do with the running of the lines at the time the property was purchased?

A. Yes, sir; I went with Mr. Shipley and we run these lines, and, also, at that time we staked off the line for the ovens in front of the Herbert house, from the mouth of Hickman's run up onto the old Fayette coke works property. I think that was done either in the latter part of November or the fore part of December, 1879.

Q. It has been alleged here, Colonel, by witnesses called on behalf of the plaintiffs, that certain stakes were seen at one time, some eight or ten years ago, in front of the Herbert premises; and it was alleged by those witnesses that these were, or might have been, stakes indicating the site of Sedgwick. Do you know anything about those stakes?

A. I never saw any stakes there, except the ones that were put in by the engineers that I had charge of.

Q. At what time were those stakes placed there?

A. Mr. Shipley, our engineer, placed the stakes there during the year 1879; and then he came back afterwards and renewed those stakes again, some two or three years afterwards.

Q. And were these stakes placed along the line where the present ovens are erected?

326 A. Yes, sir. And then Mr. Wodsworth (our engineer after Mr. Shipley died), before we commenced building these ovens renewed the stakes again for the present line of ovens.

Q. Was the property between the railroad and the Herberts a portion of the property acquired by Mr. Rainey in 1879?

A. Yes, sir.

Q. And this line of stakes that you speak of were in the portion of the property lying between the railroad track and the Herbert premises?

A. Yes, sir.

Q. Several witnesses on behalf of the plaintiffs have testified that these stakes were placed there for the purpose of laying out a site for a warehouse. Do you know whether that is true or not?

A. We never laid out any warehouse or storehouse on these premises, never staked off anything of the kind. I was present with the engineers when they done all this work; that was under my supervision all the time, and to my certain knowledge there was never any warehouse or storehouse laid out there.

Q. In 1879 who was residing in the Herbert house?

A. I don't know. There was a widow lady lived there about that time, I am not sure whether it was just at that time or not, but about that time. Mr. Dean owned the property, and it was sold to James Cochran, about the latter part of 1879 or the fore part of '80. I don't know what her name was, but I know that while we were at work there there was a woman who lived there.

Q. After this line of ovens was staked out, as you have described, was any work commenced immediately for the erection of the ovens, or not?

A. Why, not at that time there wasn't. We projected a bridge across the river, with the expectation of building a line of ovens there and bringing the coal across to them, but there was nothing more done at that time except to stake them off.

Q. Then when did the first grading and building commence for the present line of coke ovens?

327 A. We began grading there along in the summer of 1890.

Q. At which end did you begin?

A. Began up the river, not quite to the upper end, but along on the Fayette tract that was afterwards acquired by Mr. Rainey. He owned a part of that, or had an interest in it, when he purchased the oil tract, and he afterwards acquired the balance. And then we began building up; I suppose—well he built fifty ovens along towards the upper end of the old Fayette tract, during the summer and fall of 1890.

Q. And those ovens that you built then are now a portion of the string of ovens that had been constructed along in front of the Herbert property?

A. Yes, sir; on the same line.

Q. You have stated that at the time of the purchase of this property, in 1879, you assisted in running the lines?

A. Yes, sir.

Q. Do you know what that property was acquired for?

A. Mr. Rainey represented to me that he had bought it for the purpose of coking the coal on the opposite side of the river; and also for some coal that was still remaining in the property.

Q. As Mr. Rainey's agent and superintendent, from 1879 down, did you ever know of any objections ever having been made to the use of this property acquired by Mr. Rainey for coking purposes, down to the time of the bringing of this suit?

A. No, sir; I never knew of any objections, down until that time.

Q. At the time you commenced laying out these ovens, do you know where the Herberts, the plaintiffs in this suit, lived?

A. They lived in a house on the Fayette coal property, above their present location.

Q. In what business were the Herberts engaged at that time?

A. I think they were working about the coal works.

328 Q. Were the Herberts living in that neighborhood at the time this original line was staked off in front of the house they now own?

A. Yes, sir; my recollection is, they were living in one of the houses on the Fayette tract that would be now about the line of this line of ovens; a little further up the river from where they now live.

Q. About how far is the last oven on the eastern line from the Herbert house?

A. I never measured it; the lot is about 109 feet wide, front; I believe, and I would judge it to be about 165 feet; I did step it off once, too, some three or four weeks ago when I was there. My recollection is, it's about 165 feet, to the nearest oven in operation on the eastern side.

Q. On the western end, are those ovens in operation?

A. No, sir; there are no ovens completed on the western end at all.

Q. How far are they from the Herbert house?

A. Well, the last oven that there is any work done on is about 65 or 70 feet, I believe, below the lot and house.

Q. Since the commencement of these proceedings, then, what is the nearest coke oven that has been in operation?

A. The nearest coke oven in operation to the Herbert house, do you mean?

Q. Yes.

A. Well, the nearest one would be about 165 feet from the Herbert house.

Q. Do you know how deep the Herbert lot is?

A. I stepped it off. It is about 200 feet, I would judge.

Q. From your experience and knowledge in a business of this character, would a house built on the rear portion of the Herbert

lot be habitable, or not, for such use as they are put to in this region?

A. I think it would. I know of many houses that are even nearer than that to coke ovens that are occupied by families.

Q. Is that true of other coke works there than the Rainey?

329 A. Yes, sir; I know of a number of places along the Mount Pleasant branch and up at Jackson's mines, and other places. There is Mr. Hare's house at the Paul works, I don't think it is over 175 feet from the ovens.

Q. Then, if this line of ovens is completed in front of the Herbert house, would that, in your opinion, destroy the entire value of the lot?

A. No, sir; I don't think it would.

Q. Have you ever made an examination of the Herbert house?

A. Well, I have never made—I have been by it there, worked around it frequently and looked at it as I would at a house; I never made a close examination for the purpose of making a detail estimate of what it would cost, such as a carpenter would make, but I have looked at it and passed my judgment on it.

Q. Do you own real estate in this neighborhood?

A. Yes, sir; I own just across the river.

Q. Have you had any dealings in the real-estate business in that neighborhood that has given you such experience as would enable you to place an estimate upon a house and property of this kind?

A. Yes, sir; I have had some experience in that direction.

Q. Did you ever lay out any town lots?

A. I laid out a town, the town of Alexander, now called Vanderbilt, and sold the lots and sold some houses; also sold some lots adjoining East Liberty and some houses in East Liberty.

Q. Do you know what the value of this house and lot is, as it stands, unaffected by the line of coke ovens in front; taking the whole property, as it was before any such coke ovens were placed in the neighborhood?

A. My judgment would be, the property would be worth from $900 to $950.

Q. That is not quite answering the question. The question is, Do you know?

330 A. That would be only my judgment; I have built some houses and sold some houses.

Q. You knew this house at the time it was erected?

A. Yes, sir.

Q. And you have noticed what improvements, if any, have been made?

A. There has been some improvements. The house was first weather-boarded up and down; it is now weather-boarded around. There is considerable difference in a house if it has a frame. If it was built with what is called a balloon frame, there would be nothing much to hold it up. When it was first built, it was just a balloon frame weather-boarded up and down with common, what we call barn boards.

Cross-examination by Mr. CAMPBELL:

Q. If I understand you, Colonel, there is a break just in front of the Herbert house in this line of ovens constructed by Mr. Rainey last summer, is that correct?

A. Yes, sir.

Q. What is the width of that break?

A. Well, now, let me see. It is about 250 feet along there; maybe a little more than that. The nearest oven on the west end would be about 65 to 70 feet from the house, and the nearest oven at the upper end now being operated would be about 165 feet; that would be the width of the break between the ovens.

Q. If that break is filled up, with the ovens constructed uniformly with those that are now there, would not the ovens touch the Herbert house?

A. I don't suppose they would quite touch it, but they would come very close to it.

Q. Do you say that the Herbert house would be habitable, if the ovens as now constructed there, with the break in front of the Herbert house, should be operated in the making of coke?

331 A. No, sir; I didn't say so. I said a house on the rear end of the lot could be occupied.

Q. Would the house situated where it is now be habitable?

A. No, sir; I don't think it would; it could be lived in, but I wouldn't think it would be pleasant or comfortable.

Q. To remove it to the rear end of the lot would take it about 200 feet, you think, away from where it is now?

A. In the neighborhood of that, I believe the lot is about 200 feet in depth.

Q. Do you think it would be habitable then, if the ovens were in operation?

A. I do. I know a number of houses not so far away as that would be that are lived in.

Q. Would you live in it yourself?

A. I might have to live in a worse one; I don't know. I wouldn't be compelled to live in it just now, owing to fortunate circumstances, but I might have to live in a worse one.

Q. Would you live in that house, removed as far as it could be removed on the Herbert lot, if you couldn't help it?

A. If I couldn't help it, I would.

Q. Would you live there if you could find any other place to live?

A. If I was a coal miner or a coke drawer, or working about the coke ovens, I wouldn't hesitate to live in it, situated that far away from the ovens.

Q. Would you under any other circumstances?

A. I might have to under other circumstances; if the ovens were built in such close proximity to the house that I now live in, I wouldn't move out.

Q. Would you choose that house for a place of residence if the ovens were to be constructed?

A. No, sir. If I was making a choice, I would take some of these houses out in East End, or, perhaps, your house up in Uniontown.

Q. In preference to that Herbert house, if it should be removed to the rear of the Herbert lot?

332 A. Yes; I would prefer a house in the East End, or your house in Uniontown, to living there, or even to where I do now.

Q. Why?

A. Because it would be a more desirable place to live. But the question, as I understand it, is, would that house be habitable for a man to live in?

Q. I am simply asking you now if you would yourself reside there, unless you couldn't help it?

A. A man always takes the best circumstances he can get a hold of; of course, I would prefer some other place; but if I was a laboring man, I wouldn't hesitate to rent that house and live in it, situated 200 feet back from that line of ovens.

Q. Now, answer my question that I put to you. Would you yourself live in the house if it were removed to the rear end of the Herbert lot, if you could find any other place to live?

A. Well, I can hardly understand the question as you put it, from the fact that I don't know what kind of circumstances I might be placed in some time.

Q. Would you do it if you could help it?

A. I wouldn't choose that as a location if I could help it any way, coke ovens or no coke ovens.

Q. Would you live that near to any coke ovens if you could help it?

A. Yes, sir; if a line of ovens were constructed within 200 feet of my present dwelling place, I would not move out from my home on account of it.

Q. Do you think your wife would stay with you?

A. If she wouldn't I would get another one; however, she appears to think a good deal of me.

Q. The location of Sedgwick for a town is not a bad one, is it?

A. Why, I don't know why; I suppose if there was anything there to induce people to build, it might do to build on.

333 Q. Isn't it located on the bank of the Youghiogheny river?

A. Yes, sir.

Q. Isn't it rather high ground?

A. It is above high water; yes.

Q. Doesn't it slope gently back to the river hill?

A. It is very spouty there.

Q. Drainage would correct that, would it not?

A. Yes.

Q. How far back from the Youghiogheny river is the brow of the river hill—in the rear of Sedgwick?

A. Well, it slopes gently back from the river.

Q. How far?

A. On back?

Q. Till you come to the highest point of that ridge.

A. I suppose four or five hundred feet; probably more.

Q. And then when you come to the ridge of that slope, how is the ground there?

A. On top of it?

Counsel for the defense objects to this line of examination, as not cross-examination.

Q. Yes.

A. After you get on top of the hill, it is pretty level ground back there.

Q. For quite a distance?

A. Yes, sir.

Q. Back and up and down the river?

A. Yes, sir.

Q. Do you know where Hickman's run is?

A. Oh, yes.

Q. How far is Hickman's run from the Herbert house?

A. Well, I judge it is between three and four hundred feet.

Q. Is it west?

A. Down the river, pretty near northwest.

334 Q. Hickman's run is down the river from the Herbert house?

A. Yes, sir.

Q. From Hickman's run up the river, how far is the land about level?

A. Well, it is not level; it is sloping back from the river.

Q. I don't mean in that direction. You have already stated that it rises from the river backwards. I am now inquiring from Hickman's run up to the Youghiogheny river how far the land is unbroken and smooth.

A. It would be about 2,500 feet, I reckon.

Q. Isn't it smooth and level up beyond the old Fayette coke works?

A. Yes, sir; and then there comes a break at the upper end; that would be in the neighborhood of 2,500 feet from Hickman's run to this break.

Q. Did you ever hear of Sedgwick?

A. I never heard of Sedgwick, except as a station on the railroad there, until these proceedings were begun.

Q. Did you ever hear of Sedgwick station on the railroad?

A. Yes, sir.

Q. When did you hear of that?

A. Why, that was in operation several years ago; I don't know how many years. The place used to be called Fayette. It was first called Strickler; Stewart Strickler laid out the plant there and erected some ovens; they were the first coke ovens ever operated and shipped by rail.

Q. It was before Mr. Strickler left Fayette county that he erected these ovens?

A. Yes, sir.

Q. That was back as far as 1860?
A. Yes; during the war; that place was called Strickler.
Q. Until it was called Fayette?
A. Yes. At that time it was called Strickler station then. After Stewart Strickler went away he sold his interest to Graff, Bennet & Company——
Q. I don't want that. I am merely asking about these names.
335 A. I was going to tell you what I knew of——
Q. Are you now in the employ of Mr. Rainey?
A. No; not at present.

Redirect examination by Mr. DICKEY:

Q. You speak of a station called Sedgwick; where is that situated, with reference to this property of the Herberts?
A. That would be, I judge, about 300 yards above the Herbert property—where the station was.
Q. What was that called before it was called Sedgwick?
A. Called Fayette.
Q. When was the name changed to Sedgwick?
A. Well, it has been some ten or twelve years; maybe more; I can't say definitely when it was changed.
Q. And before it was called Fayette what was it called?
A. It was called Strickler before that.
Q. Do you know the reason why it was changed from Fayette to Sedgwick?
A. Mr. Adams, the railroad——

Judge CAMPBELL: Don't tell us what you heard.
Mr. DICKEY: I am asking him if he knows the reason.
Mr. CAMPBELL: I object to the witness giving hearsay testimony.

Mr. DICKEY:

Q. Tell us what you heard.
336 A. Mr. Adams told me that they had another station on the Fayette county branch, above Connellsville, called Fayette, and it was necessary for them to change it.
Q. Who was Mr. Adams?
A. He was general road-master for the western division of the B. & O. railroad. Also at a meeting in the B. & O. office here, the question at one time came up, while I was present, about changing that, and it was then decided to change it to some other name. I was at that time one of the assistant auditors of the B. & O. railroad.
Q. There was another station above there called Fayette?
A. Yes, sir.

Mr. SHIRAS:

Q. It has been testified to here by some of the witnesses for the plaintiffs, that certain stone has been placed in front of this house; will you state for what purposes it was placed there?
A. There has been some stone placed in front of the house there

for construction purposes. The nearest to the house is thirty feet; I was present when that was measured.

Q. Is that the place where the material is unloaded?

A. Yes, sir; it is unloaded there off the cars on the side track, and placed there for constructing the ovens, and hauled away from there in each direction.

Q. Is that the most convenient place for dumping the material, so that it can be taken elsewhere?

A. Yes, sir.

Q. Is there an open place between this material and the house?

A. Oh, yes.

Q. Is the usual method of ingress and egress to and from this house the same as it was before the commencement of these ovens?

A. Well, on the upper side of the lot the ovens are down pretty close to the lot there.

337 Q. What I mean is,—do you know, first, what was the customary way of entering and leaving this house—was it in front or on the side?

A. For the past several years they seemed to be coming in from the road that is laid out back of the house. There was no way to come up from Dawson along the river, that road having been shut up for some time, or obstructed by railroad tracks, and they come in from the back part of the lot generally.

Q. In entering and leaving the house, was the usual entrance through the front or at the side?

A. It seems to be through the side, as there are no steps connecting there for the portico.

Q. Has that method of egress and ingress been interfered with at all?

A. The side entrance? No, sir.

Hearing adjourned to meet on Tuesday, March 29, 1892, at 10 o'clock a. m., counsel for plaintiffs objecting to any further adjournments, on the ground that defendant has already had ample time given for his testimony.

And now, to wit, Tuesday, March 29, 1892, parties met, pursuant to adjournment, at the office of J. M. Garrison, and proceeded with the taking of testimony on behalf of the defense, at the hour of 11 o'clock a. m.

Present: J. M. Garrison, Esq., of counsel for plaintiffs, and Messrs. Shiras and Dickey, of counsel for defence.

L. L. COLLINS, sworn on behalf of defense.

Direct examination by Mr. SHIRAS:

Q. Where do you reside?

A. I reside in Fayette county, between Vanderbilt and New Haven.

338 Q. Where in respect to the property of the complainants here, the Herberts?

A. Right opposite, across the river.

Q. How long have you resided there?
A. Well, I have been there since 1863, except two years.
Q. Have you lived there continuously since 1870 down to the present time?
A. Yes, sir.
Q. Do you own property there?
A. Yes, sir.
Q. Opposite that of Herberts?
A. Just right across the river, right opposite.
Q. During the time that you have resided in this neighborhood, have you ever heard of the town of Sedgwick?
A. Never. Never heard of it until just lately.
Q. When was that?
A. That is within a few days.
Q. Are you well acquainted, or not, with the Herbert property, its appearance and location?
A. Well, I have been past it frequently and can go a quarter of a mile from home and look right down it, you might say.
Q. How much property do you own there?
A. 120 acres; 121 acres.
Q. When did you buy it?
A. About eight or nine years ago this spring; I don't remember which.
Q. Did it have improvements on it?
A. Yes, sir; it was a farm pretty well improved, a house and barn and other out-buildings.
Q. Fences?
A. Yes, sir.
Q. Orchard, or any improvements of that kind?
A. Oh, yes, sir; there are two orchards on it.
Q. What did you pay an acre for that?
A. Fifty dollars.
Q. Including the improvements?
339 A. Yes, sir.
Q. How does that correspond with the property on the other side of the river, owned by the Herberts?
A. Well, I would consider that I am on a great deal better land than the other side; a great deal more valuable property for my use.
Q. You have testified that you have lived for 30 years in this neighborhood?
A. You might say ever since I was born, I have been in the neighborhood, except a few years.
Q. During your residence there, and from your purchase of property, are you able to give the value of the Herbert house and ground—your judgment of that?

Objected to by counsel for plaintiffs, because the witness has not testified to sufficient means of information to enable him to form an opinion as to the value of this particular property.

Q. What, in your judgment, would be the market value of this house and lot?

A. From what I have seen of the property and what I know of it, providing there was nothing there——

Q. Yes; independent of the coke ovens.

A. Independent of anything there, I would think $1,000 would be a very good price for the property.

Cross-examination by Mr. GARRISON:

Q. What business were you engaged in before you bought this farm?

A. I was farming.

Q. How far from where your farm now is?

A. Right on the same farm—pretty much on the same farm, the farm adjoining it, my uncle's farm, which lies next to the river.

Q. Did you ever own any town property?

340 A. No.

Q. Did you ever buy or sell any town property?

A. No, sir.

Q. You bought your land for farming purposes?

A. I did.

Q. And there are 120 acres of it?

A. Yes, sir.

Q. Were you ever inside of this Herbert house?

A. No, sir.

Q. You say you see it nearly every day?

A. Oh, well, I have seen it frequently; because when I am out that way I can look right over that property; then I have passed it—not very lately, but I have been past it frequently, on that side of the river.

Q. You say you never heard of the town of Sedgwick until recently?

A. I never heard of the town of Sedgwick. There was Sedgwick station there that used to be Strickler station.

Q. Was it called Sedgwick before its name was changed to Strickler?

A. No, sir.

Q. Its name was first Strickler?

A. Yes, sir. I kept store there at that time.

Q. How long ago has this been?

A. That was in 1863.

Q. It was then called Strickler?

A. Yes, sir.

Q. Then, it was subsequently changed to Sedgwick?

A. No, sir; it was changed to Fayette.

Q. Then how long did it remain Fayette?

A. Not very long; I can't tell you just how long, but there was another station between Connellsville and Uniontown, I think, on the B. & O. railroad called Fayette, and it was then changed to Sedgwick station.

Q. How long did it continue to be called Sedgwick station?

341 A. I suppose it was called that until the station was abandoned; there has been no station there for some time.

Q. How far was that Sedgwick station from this Herbert house?

A. It is a good ways above; I don't know just exactly the distance, probably a quarter of a mile, maybe more—up to where the old store used to stand at Sedgwick station—the old Strickler store.

Q. When did you last notice this Herbert property?

A. Well, I can't just tell when I have been on that side of the river, past it on that side; I have seen it from this side. I went down to the river there along the railroad last Saturday and saw it then, that is, across the river.

Q. The lot is enclosed within a fence, is it?

A. I think it is.

Q. And the house is flush with the front of the lot?

A. I think it is flush with the lower side of the lot next to the river.

Q. Next to the railroad?

A. Next to the railroad, rather.

Q. What is immediately in front of the house, as you recollect?

A. Right immediately in front of it I think there is some stone and probably some dirt there.

Q. Then on either side of the house, isn't there coke ovens built up?

A. Yes, sir; there is coke ovens; they don't come up to the lot, though, on either side.

Q. Leaves an opening in the line of ovens immediately in front of the house?

A. There is an opening; they don't come to the lot.

Q. Are they operating any of these ovens?

A. Yes, sir.

Q. Making coke in them?

A. Yes, sir.

Q. Did you notice whether there was any foundation there for ovens immediately in front of the house?

342 A. There is no foundation right immediately in front of the house, that I know of.

Q. Did you notice whether there had been any digging, or preparation for ovens immediately in front of the house?

A. Well, now, I can't say as to the digging; there is some material lying there; I can't say whether there has been any digging there right in front, or not.

Q. You say that the value of this house and lot would be, according to your estimate, about $1,000, as unaffected by the construction of coke ovens there?

A. Yes, sir, by what I could get other property around there, in a more desirable location than what that is, that would be its full value.

Q. What could you get other property around there for?

A. I can buy a house and lot right in the borough of New Haven,

as large as that and pretty near a new house, for $1,300; was offered it Saturday.

Q. Then you put your estimate as to the value of this property upon the value of property in New Haven?

A. No, sir.

Q. Then what do you base it upon?

A. The location of the property, and other property around.

Q. Where is there any property that has been bought and sold right near this, and give us the price of it?

A. Well, I don't know of any property right within the immediate neighborhood of that, because I don't know of any property being sold right there lately; it is not a very desirable place for people to buy property of that kind.

Q. Why isn't it?

A. Well, it is right along the railroad there, and there is no very good outlet from it.

Q. Isn't the construction of those coke ovens there at that immediate point a detriment to its value?

A. I suppose it would be some.

Q. Suppose they should close up this opening in front of the house there and construct the ovens clear through and operate them, what would be the effect on the value of this property?

343

A. Well, I don't know.

Q. Would it increase or decrease its value?

A. Of course it would decrease the value of it. Of course ovens built right along close to a house would naturally decrease the value of it.

Q. Could the house be used as a dwelling at all, if those ovens were closed up and operated there?

A. Well, there is houses used very close to the ovens all through that country there, that is occupied all the time, you might say.

Q. If that line of ovens should be closed up immediately in front of the house, so as to make the line of ovens within a foot of the side of the building, could the building be used comfortably as a dwelling-house?

A. I suppose not, if they would run that close to it, but it could be moved back from the front end of the lot.

Q. I am asking as it stands; could it be occupied as a dwelling-house, with comfort to the occupants?

A. No; I don't think it could.

Q. Would it not, then, practically destroy the property as it stands, as a place to live, as a dwelling-house and lot—a place to live?

A. Well, it wouldn't be desirable as close to the ovens as that. Of course it would practically destroy living in the house, but I don't know just how close those ovens would come to the house; of course I have seen people frequently live in houses within fifty or 60 feet.

Q. I ask you, if the closing up of that line of ovens there in front

of the house should bring them within a foot of the house, whether the house could be used and occupied with comfort as a dwelling?

A. No.

Q. Could it be used and occupied as a dwelling at all?

A. As regards that, I don't know; I don't know how that would be. I don't know whether people would live there—I sup-
344 pose not; it couldn't be occupied, I suppose if it was within a foot.

Q. Did you go down there on the ground, close to the house, and examine it carefully?

A. How is that?

Q. Did you make an examination of the house and lot, on the ground there, with a view to being a witness here?

A. No, sir.

Q. You don't know how it is finished inside?

A. I don't.

Q. Don't know what its dimensions are?

A. I suppose the house is about 16 x 30.

Q. You made no measurements?

A. No, sir.

Q. Didn't measure the lot?

A. No, sir.

Q. Didn't examine what improvements—fruit trees, are on it?

A. Nothing, only what I saw from passing by. I have made no late examination at all.

Redirect examination by Mr. SHIRAS:

Q. From your knowledge of that locality, and the manner in which houses are occupied close to ovens, would you say that the value of this lot is destroyed for occupancy by the building of these ovens in front of the house; that is, would there be no value to the lot?

A. Of course there would be a value to the lot.

Q. If a man were to build on the rear portion of this lot, 175 to 200 feet from the line of ovens, would it be tenantable?

A. Yes, sir.

Q. You say you have knowledge of other houses in that locality being built close to these coke ovens. How close do you know of their being built?

345 A. Well, I know of one, in particular, that is occupied all the time, that is within sixty feet; of course there is others I don't know the distance of, but there is many houses in that locality that is occupied very close to the ovens.

Recross-examination:

Q. Would you like to live in a house on the rear of this lot, if they should operate those coke ovens there in front?

A. I never lived in a coke-house; I wouldn't want to live there, of course, I wouldn't want to live near any coke ovens.

Q. It is not a very desirable place to live, then?

A. I don't suppose it is; I never tried it.

THOMAS J. MITCHELL sworn on behalf of defendant.

Direct examination by Mr. SHIRAS:

Q. Where do you reside?

A. I live in Connellsville, Fayette county, Pennsylvania.

Q. What is your present business?

A. Manager for W. J. Rainey in the Connellsville coke regions.

Q. How long have you been there?

A. I have been there about five years. Formerly I was connected with Mr. Rainey in other capacities, and have been connected with him for about thirteen years, or fourteen years.

Q. Does your business as manager lead you to visit the coke works frequently?

A. Yes, sir; daily.

Q. Are you well acquainted with the Herbert property?

A. I am; yes, sir, and have been for a long time.

Q. Prior to your moving to Connellsville, had you occasion to visit this property?

A. Yes, sir.

Q. How long have you known the Herbert property?

346 A. The first time I was on the property, I believe was in the year 1877; '77 or '78; I think '77.

Q. Do you know when Mr. Rainey bought this property in front of the Herberts, which is now in controversy?

A. Yes, sir; it was the Youghiogheny Oil Company's property; he bought it in 1879.

Q. Have you any personal knowledge, growing out of that transaction, as to the purchase from the company, etc.?

A. Yes, sir; I have. I carried on part of the negotiations for the purchase of the property, and visited the owners for the purpose of buying.

Q. What was this property bought for—that is, for what purpose?

A. Primarily, because there was coal, coking coal, under a part of it, or claimed to be; and, also, on account of its being adjacent to other large coking fields; and on that account it was desirable for the erection of coking ovens.

Q. It has been testified to here on the part of the complainants' witnesses, as well as on the part of the defendant, that certain stakes were seen upon the property opposite the Herbert house. Have you any knowledge of those stakes?

A. Yes, sir. Just at the time of the buying of this property, or immediately after it was bought, I went on the property with Mr. Rainey's engineer and with Mr. Hill, also, who lives in that region, and we began laying out or locating coke ovens. The first thing to be done is always a survey, for the purpose of staking them out and locating them on the ground. We located ovens on both sides of the river about that time, on this side and also on the opposite side.

Q. Was that the only time that surveying was done there?

A. No, sir. The coke business at this time was very brisk, along

in 1879, and a little while after this coke went down in price, and it was pretty dull; it revived up again some time after that, and we went at this location again. I think it was about '83, again we renewed those stakes and went over them; some were still there, and replaced them, and relocated our line.

347 Q. Where did this line of ovens begin?

A. It began at the eastern end of what they called the Youghiogheny Oil Company's tract and extended down the river, along in front of the Herbert house to what is called Hickman's run.

Q. Was this line of ovens staked off prior to the purchase of the property by the Herberts?

A. I think it was. At the time we staked this out there was some person living there, but I think not the Herberts. They lived above this about three or four hundred feet above the upper end of this in the house that was then a part of the old Fayette Coke Company's plant, if I ain't mistaken.

Q. When did Mr. Rainey first begin actually constructing these ovens, the first grading and building?

A. In 1890; along that spring we had the stakes renewed again there, and the line extended clear up the river onto what was formerly the Fayette Coke Company's property. We began grading and building the ovens, I think, in the summer, in July of 1890.

Q. After you began grading this line of ovens and erecting the same, when was the first time that you know of the complainants having made objection?

A. We had built upwards of a hundred ovens in this line that extends down to this house before anything was ever said about it by the Mr. Herberts, so far as I know.

Q. Were you present at the time of the grading and building of these ovens?

A. Yes, sir; I was there daily, had charge of the work; before they made any objection the work had extended up close to their lot; at the time of the filing of the application for an injunction we had cut out in front of the Herbert house and lot the foundation for the front wall of ovens—what is called the front wall—and filled that with stone up level with the ground; and it is there still in front of the Herbert house and lot, and also below there we did some work.

348 Q. And you say this property upon which you are building this line of ovens in front of the Herbert house was acquired in 1879?

A. Yes, sir.

Q. Was that prior to the purchase of the property by the Herberts—their house and lot?

A. Yes, sir; as I understand it, it was, yes, sir; well, I know it was. At that time this property was owned by a man named Dean; Mr. Cochrane bought it from Dean, and the Mr. Herberts bought it from Mr. Cochrane.

Q. It has been alleged that this line of ovens has been built upon

a portion of a town site called Sedgwick. At that time, or prior to that time, had you ever heard of a town of Sedgwick?

A. I never heard of a town of Sedgwick, never had any knowledge of that place and have no recollection of ever having heard the name all except the station of Sedgwick. There is a Sedgwick station about 1,800 feet above the Herbert lot, on the B. & O. railroad; there used to be a little platform there; and there has been a station there called Sedgwick station, for the old Fayette coke works; it is a flag station, only a few trains stopping there. It is almost as far above the Herbert property, east of it, as Dawson is below.

Q. The complainants have offered in evidence here two deeds from Mr. Cochrane to Mr. Rainey, one dated 1887 and one 1889. How long subsequent to the purchase of this tract in front of the Herbert house, respectively, did Mr. Rainey buy this property in front of the Herbert house?

A. Mr. Rainey bought this property in front of the Herbert house in 1879, and this must have been ten years subsequently. I don't recall the deed of 1887.

Q. The deed of 1887 would be how long?

A. That would be eight years.

Q. And the deed of 1889.

A. Would be ten years subsequent to the purchase of this Youghiogheny Oil Company property.

349 Q. How close is the nearest oven to the Herbert house, on the eastern side?

A. Upwards of 150 feet on the east side.

Q. And on the west side?

A. On the west side there are no ovens completed at all. There are some foundations for the ovens; they are 66 feet away by actual measurement, from the Herbert house.

Q. How close is the nearest oven on either side in operation?

A. On the east side about 165 feet, from the Herbert house; there are none in operation on the western side.

Q. Is the nearest oven on the east side in operation at all?

A. No, sir; it is not; it is not completed.

Q. Have you a knowledge of real estate in that neighborhood?

A. I have negotiated for a great deal of real estate there and know of the sales there. Yes, sir; I have.

Q. Have you any knowledge of the erection of houses and the cost of the same?

A. Yes, sir; we build a great many houses and I superintend and look after the building of them.

Q. Are you acquainted with the size of the house and the size of the lot of the Herberts?

A. I measured the house and I measured the lot. The house is 16 x 32; 16 feet high, two stories; with a wing composing the kitchen, 16 x 18 feet, one story; two chimneys in the house; no chimney in the kitchen, just a terra-cotta pipe; the house was a plank house, with the boards running up and down, unpainted, and in a dilapidated condition, and so remained until after we began building these

ovens along this line in 1890, when they put some improvements on it, weather-boarded the house and put on a new roof.

Q. Then, these improvements were made after the commencement of the line of ovens which was projected in front of their house?

A. They were; yes, sir.

350 Q. From your knowledge of the value of land in that neighborhood, and from your experience in the erection of houses and the cost of the same, what would you say the value of the Herbert house and lot is, in the open market?

A. Between six hundred and eight hundred dollars. I would say $800 would be a liberal price for the property.

Q. In case this line of ovens were projected in front of the house so as to be within a few feet of the same, would that destroy the value of the lot, or could it have a house erected on the rear end, which would be tenantable?

A. Yes; a house could be put upon the rear end, and be tenantable, and be rented readily; we now have houses just above this house, on the same kind of ground, right back of the oven line, that is in full operation, and we have them occupied all the time; and I could lease five houses for any one I have there. They are not two hundred feet away from the ovens.

Q. By the building of these ovens in front of the house, would access be cut off to the lot?

A. No, sir; not at all; the road from Dawson to Hickory square, as it has been denominated, runs right along the length of this lot, across the full end of the lot, and affords ready and full access to and from the lot. It is the only traveled road through there, except persons traveling along the railroad, on the railroad; there is no other traveled route reached there. Foot passengers, of course, go along the railroad; but if they don't take the railroad, they take this county or township road.

Cross-examination by Mr. GARRISON:

Q. You have been active in the management of the defense in this case from first to last?

A. Yes, sir.

Q. And have attended nearly all the meetings before the examiner?

A. Nearly all of them; yes, sir.

351 Q. Looked after the preparation of the testimony?

A. I have. I have charge of Mr. Rainey's business up there.

Q. Hunted up the witnesses?

A. I have; I have charge of Mr. Rainey's business up there, and it is my business to look after these matters. I know more about Mr. Rainey's affairs than he does himself.

Q. Then, you have entire charge of this defense as general manager of Mr. Rainey?

A. No; not entire charge, but I have charge of the details.

Q. Were you in the employ of Mr. Rainey at the time he purchased this land from the Youghiogheny Oil Company?

A. Yes, sir.

Q. Did you carry on the negotiations for its purchase?

A. I went down to Harrisburg to negotiate with these parties.

Q. With whom?

A. With some of the parties who owned it.

Q. Some persons representing the Youghiogheny Oil Company?

A. Yes, sir; I think it was one of the stockholders.

Q. Did Mr. Rainey have an attorney at that time?

A. Yes, sir.

Q. Who was his attorney at this time, in the matter of this purchase?

A. I don't remember that he had any attorney in the matter of this purchase.

Q. Who prepared the deed?

A. It was prepared by the company.

Q. Who examined the deed for Mr. Rainey?

A. I think Mr. Willey was his attorney in Cleveland at that time.

Q. To whom was the deed delivered?

A. To Mr. Rainey, I think, sent to him.

Q. Then, you had nothing to do with the preparation or examination of the deed?

352 A. No, sir; I hadn't; I know the deeds were made out by the parties who sold.

Q. Mr. Rainey's attorney at Cleveland examined the title, did he?

A. I don't know about that; I don't think he made any special examination of the title; that purchase was done rather hastily; other persons were bidding for the property.

Q. Is it Mr. Rainey's custom to take a property without examining the title?

A. He generally takes his own course in those matters.

Q. Isn't he rather particular in such matters?

A. I don't think he is, in matters of title.

Q. You don't know then, what examination he had made as to the title to this land?

A. He didn't examine the title to this land at all; he took their warranty.

Q. How do you know that?

A. I went to Harrisburg at Mr. Rainey's suggestion, to purchase this property, and they asked me, I thought, too much for the property, and I came away; and the negotiations still went on by letter between the parties at Harrisburg and Mr. Rainey; and Mr. Rainey, I think, went back to Harrisburg the following week, and paid, probably $2,000 more for it than they had offered it to me for.

Q. How does that enable you to say that he didn't examine the title?

A. It was done quickly and Mr. Rainey took their examination.

Q. Do you know where the deed was received?

A. It was received shortly after that.

Q. Do you think you were present when the deed was received?
A. I think I was.
Q. Was it delivered in Cleveland or in Fayette county?
A. It was sent to Cleveland.
Q. Do you know whether it went into the hands of Mr. Rainey's attorney there, or not?
353 A. I don't remember that; I don't think he put in the hands of any attorney at all. He found he had to buy it quickly, if he got it at all, because other parties were bidding against him, and had run the property up $2,000 between the time I was there and the following week.
Q. Then, you don't know to a certainty whether he had the title examined or not?
A. I feel very certain he didn't, on that account.
Q. Did you ever hear him say he didn't?
A. No; I don't remember that I did.
Q. Do you know whether he bought it by articles of agreement, or whether he had the deed made to him upon the purchase, or not?
A. I don't; Mr. Rainey bought it and came away, and the deed followed.
Q. Is it not true, as a matter of law, that if he had made an article of agreement for the purchase of this property that would have secured it to him, and he had a reasonable time to examine the title?

(Objected to.)

A. I think, as a matter of law, that he would have had time to examine the title; yes.
Q. Then, when you gave as a reason for your thinking that he did not have the title examined, that he had to close it quickly, that would not be a very good reason, would it?
A. Well, I know that is a pretty good reason in most instances for making a quick purchase.
Q. That was a good reason for his making a quick purchase by articles of agreement, but is it a good reason for his taking the deed without having the title examined?
A. I think it would act on it, if you had to take it with its imperfections, or let it go.
Q. Do you know that Mr. Rainey agreed to take it with its imperfections?
A. I don't know that, but I know he had to take it then or not take it, because other parties were bidding against him, and ran the property up $2,000 beyond the price they asked me, and he just took it.
354 Q. And he took the deed for it, in order to get it?
A. Yes, sir; he took the deed, but not quickly, in order to get it.
Q. Do you think he already had an article of agreement for it?
A. My impression is that he must have had, because he came back home, and I think the deeds followed him very soon; but I

believe he paid for it. I have some recollection of the deed coming on; they sent it afterwards.

Q. Did you see the deed yourself, at the time it was delivered?

A. I remember the deed coming by mail, for I open his mail.

Q. Were you then stationed at Cleveland?

A. Yes, sir; I was.

Q. And you have a distinct recollection, then, of opening Mr. Rainey's mail and finding this deed in it?

A. Yes, sir; I recollect of receiving them.

Q. Do you recollect how long that was after he made the purchase in Harrisburg?

A. Very soon afterwards.

Q. How long?

A. I can't at this late date state how long, but within side of a few weeks, I think.

Q. At the time he purchased this land from the Youghiogheny Oil Company, this Herbert house was occupied, was it not?

A. Yes, sir.

Q. Occupied as a residence?

A. I believe it was.

Q. Wasn't there a passage-way in front, where teams went back and forth?

A. There was a road leading from Dawson—came down and crossed the railroad in front of the house and went up the hillside.

Q. That was in front of this house?

355 A. Yes, sir; right in front of this house the road crossed the railroad.

Q. Was there an open space on the side of the lot?

A. It was open all around the lot, except on the south side where, I think, there was a field fenced in on that side, on the west side.

Q. How long after Mr. Rainey purchased this property did you take his engineer and go there and stake off these ovens?

A. Very soon; inside of a few weeks.

Q. Where did you stake off the nearest line of ovens to this Herbert property?

A. We staked off only one line of ovens; it ran from the eastern boundary of this property down parallel, or nearly so, with the railroad to Hickman's Run branch of the railroad, to the west side of the property; the line ran along in front at about the same location where the ovens are now located.

Q. After that was staked off, there was nothing done for some time?

A. No, sir.

Q. How long was it until there was staking done again there in that locality?

A. In two or three years, or, maybe, three or four years; I think it was '83 or '4.

Q. Did you have the stakes put at the places they were before?

A. Some of the stakes were still there.

Q. At the time you made the second survey, were the Herberts living in this house then?

A. Well, somebody was living in it; I am inclined to think they were, though I am not positive as to that. I saw people there, and I think it was the Herberts.

Q. That was the second time. Then were the stakes put in there a third time?

A. We staked it again in '89 or '90, before we went to work again.

356 Q. And were those stakes practically on the same location as the first stakes put there?

A. Yes, sir.

Q. And the second stakes?

A. Yes, sir.

Q. Then at the time you made the third and last survey, and drove the stakes in, the Herberts were living in this house?

A. Yes, sir; they were.

Q. Did you see Thomas and George Herbert about there?

A. No; but I knew they lived there; I have seen them going in and going out, but at the time I staked the stakes, I can't recall that I did.

Q. When you put the stakes in the first time and the second time and the last time, it was done for the purpose of constructing the ovens where those stakes were placed?

A. It was.

Q. How near would that bring the line of ovens to this Herbert house?

A. Within two feet.

Q. And it was then Mr. Rainey's intention from the start to construct those ovens within two feet of this house and to operate them there as coke ovens, in the manufacture of coke?

A. Yes, sir.

Q. And you say it was not until work had begun there on the ground that the Herberts made objection to the constructing of the ovens so close to the house?

A. So far as I know, and I think I know the first objection that was made to any of Mr. Rainey's employés; it was when we had built down almost to their line—that is, we had graded and built the ovens above, onto this ground, or nearly to it; done a large amount of work there.

Q. If those coke ovens were to be constructed and operated there, in front of the house, according to the foundation wall there, within two feet of the house, could this house be used as a dwelling-house at all? Wouldn't it probably set fire to the house?

357 A. Not if built the way they are designed to be built; but it would not be a desirable place to live at all, and I wouldn't think it would be readily leased to any person that was desirable to have in the house.

Q. Still it was the intention of Mr. Rainey and yourself to construct ovens there in that way, so that the dwelling could not be used with comfort?

A. It was the intention to construct them right there.

Q. Without regard to the comfort to the people in that house?

A. It was our intention to construct them there, at least. I suppose Mr. Rainey has rights.

Q. You say you never heard of a town called Sedgwick?

A. Yes, sir.

Q. But you knew of Sedgwick station there?

A. Yes; the station of the old Fayette coke works; not in connection with a town named Sedgwick, so far as I have heard.

Q. When was the first objection made by the Herberts here to your constructing these ovens in front of their house?

A. When my men were working down very close to this lot, Mr. Thomas Herbert came to me and said he would like to sell out his property; that we were building up close to him; and I told him he had better talk with Mr. Rainey as to that; and he said he didn't know when Mr. Rainey was there, and I told him I would let him know when Mr. Rainey came down; I asked him what he valued this property at, and he said he didn't know. He asked me how far they were going to be built down, and I told him clear down past his house to Hickman's run; and he said he owned the land in front of the house. I told him that was peculiar, that I knew Mr. Rainey had bought it, but that if he owned it he was a long time in letting us know it, we ought to have known it long ago, and if he did really own it, the sooner he would take some action in the matter the better, because it would prevent loss to Mr. Rainey, as he intended to build there, and we were working there with that
358 object in view, and he ought to have known it long ago. He said there was a street there, and I asked him what street, and he said it was Front street.

Q. You didn't know of Front street?

A. Never heard of it.

Q. You saw Mr. Rainey's deed, did you?

A. What deed?

Q. The deed from the Youghiogheny Oil Company?

A. Yes, sir; I did; and I don't think there is any statement as to Front street in it.

Q. Did you ever see any of the deeds back of that?

A. Preceding that?

Q. Yes.

A. No, sir; I never did.

Q. Give us the next interview you had with the Herberts on that subject.

A. In pursuance of that talk, Mr. Rainey came down shortly afterwards, and I sent word to the Herberts; one of the brothers worked for me, and I sent word to him, supposing he was interested in the property, and he came to me and said he didn't own it; and I asked him to tell his brothers. So they met Mr. Rainey, I think in Connellsville.

Q. How do you know they met him there?

A. I was there.

Q. Well, what occurred?

A. They wanted to sell the property out. Mr. Rainey asked them the price, and they said $2,500; Mr. Rainey said that it was an

unreasonable price, the property wasn't worth that and he couldn't give them that, and would like to hear a reasonable price; they adhered to the price; and he offered them that he would give them in that neighborhood there twice the amount of ground that was in their lot, and build them a new house as large as it was and as good in every way, and give them a deed, in exchange for their house, if they wished to live there; they seemed to hold that valuable as a home. They declined to do that. Mr. Rainey owns about 150 acres of ground around there that surrounds this on all sides.

359 Q. They declined to accept his proposition?

A. Yes; said they wanted to move to Everson.

Q. Was that the last interview on the subject?

A. No; Mr. Thomas Herbert met Mr. Rainey again.

Q. Were you present?

A. Yes, sir.

Q. What occurred there?

A. Well, Mr. Herbert talked very little; I don't think much about it. I talked to him a little; whether he talked to Mr. Rainey any I am not sure. Said he would like to sell the property, and he still talked of $2,500, and Mr. Rainey wouldn't listen to that price.

Q. Then you went on with the construction of these ovens after that?

A. I proceeded with the construction of the ovens all this time.

Q. Then how long was it after that until this proceedings was brought in court for an injunction?

A. Pretty soon after that.

Q. How much wall had you constructed up to that time?

A. Over two thousand feet.

Q. Were the ovens completed?

A. About 125 ovens were completed; yes.

Q. Then what was done after these proceedings were instituted in court and a preliminary injunction granted?

A. Where?

Q. Towards the construction and operation of these ovens.

A. The ovens above, or east of the Herbert house, within about forty-five feet of their lot fence, were partially under way, and those were finished up to that point. The ovens that were begun partly in front of the house, or for 60 feet below the house, or west of the house, were not touched.

Q. Haven't been touched since the injunction was granted?

A. No, sir.

Q. What has been done since that injunction was granted?

360 A. Since that we have unloaded some material there, because it was about the only place that it could be unloaded for use above and below this place; that is, stone and sand and brick, etc.

Q. Haven't you done the mason-work construction of any walls there since the injunction was granted?

A. Not a foot; not a stone. I have strictly adhered to the injunction.

Q. Have you been operating the ovens?

A. Yes, sir; not in front of the house.
Q. On one side of the house?
A. East of the house; yes.
Q. You have been operating them right along?
A. Yes, sir.
Q. Since the injunction was granted, was there anything done towards the foundations of the ovens?
A. In front of the house?
Q. No; on any of the ovens at all.
A. No, sir; I think no foundation whatever was laid.
Q. No foundation was laid? No mason-work has been done?
A. Oh, mason-work might be done; you asked as to foundations.
Q. Was there any mason-work done?
A. Yes, sir.
Q. On the ovens west of the house?
A. Yes, sir.
Q. That has been done since the injunction was granted?
A. Yes, sir.
Q. Has all this been done with the knowledge of Mr. Rainey?
A. Well, I presume he knows of it.
Q. You knew of it all through?
A. Yes, sir; I did.
Q. And had authority from him to do it?
A. Yes, sir; he started me at that work, and I followed it along; did it under his authority, of course.
361 Q. Then, in that work upon this line of ovens, on either side of the house, you came up in that work, after the injunction was granted, as far as you thought the injunction would allow you to come, did you?
A. After the injunction was granted, I stopped work on everything in front of this house and lot.
Q. On these ovens there?
A. And worked away from that, where I understood, and where I was advised by my counsel, that the injunction didn't apply at all.
Q. You did work, then, on this line of ovens, on either side of the house, after the injunction was granted?
A. Yes, sir; east and west of the house and lot.
Q. How many ovens did you construct on the west of the house after the injunction was granted?
A. There are none completed there.
Q. How many did you work at?
A. I think about 25 or 30.
Q. And the making of coke in the ovens has all been done since the injunction was granted?
A. No, sir.
Q. Was there coke made in any of those ovens before the injunction was granted?
A. On which side of the house?
Q. On either side of the house.
A. Before this injunction was granted or talked of, or before Mr.

Herbert said anything at all to me about this matter, we had been making coke there for some months. We began making coke there last April.

Q. How far was that coke-making away from this house?

A. It was right along on this line.

Q. How far away?

A. About 500 or 600 feet.

Q. Since the injunction was granted, you have extended the firing of those ovens up in the direction of the house?

A. Yes, sir.

Q. And you are now operating them there?

362 A. Yes, sir.

Q. When did the Herberts make those improvements on the house that you speak of?

A. It was some time after we began the construction of these ovens; I can't say just the time of year; I think it was in the fall of 1890.

Q. How near in the construction of these ovens were you to their house and lot at the time they made these improvements?

A. Between five and six hundred feet.

Q. Was that close enough to have injured their property materially?

A. For what purpose?

Q. Any purpose.

A. Well, there would be some smoke, of course, like there is in the city here with a furnace five or six hundred feet away.

Q. And, of course, that would be worse as you get nearer to the property?

A. Yes, sir.

Q. You say that there could be houses constructed on the rear of this lot there, and rented very readily, and that you have more demands for houses than you have houses to fill?

A. I have. The house that Mr. Herbert lived in prior to his living in this house couldn't have been more than 300 feet from the coke ovens—where he lived for years.

Q. According to that, it might improve this property?

A. It might; as property will rent for more money in connection with ovens that it will away from them.

Q. Then, do I understand you to say that the value of this property would be increased by the construction of these ovens in front?

A. No; I didn't say that.

Q. You say it would not be enhanced?

A. No; I don't think it would be enhanced; although I can rent houses for more money there than I could if the ovens were

363 not in that region. This property owes its value to the fact that — is located close to the coke ovens. If this property were out in the country, it would not rent for so much money. People that work at the coke ovens prefer to live near.

Q. Then, you say that when you continued the construction of these ovens, after the injunction was granted, you did it under the

advice of counsel that you could safely come within a certain distance of the house?

A. Yes, sir; counsel advised me that we would not be interfering with the injunction at all; that that would be complying with the injunction.

Q. And it was your desire to come just as near the house as you could and keep within the limits of the injunction?

A. No; it was not.

Q. Suppose the injunction had not been granted at all, you would have probably had that gap closed?

A. Undoubtedly I would.

Q. Then, when you were acting under the advice of counsel in continuing the ovens there; it was your desire to come as near to the house as you could and still keep out of range of the injunction?

A. No, sir. When they first served me with notice that a preliminary restraining order had been granted in that matter, I laid it before my counsel, and he advised me that I could proceed with my work without the court interfering with me, and the restraining order was null and void; that I could go right on and make those ovens in front of the Herbert house. I said no, I wouldn't do that, I proposed to be reasonable in the matter; that I would keep away from the house.

Q. If no injunction had been granted you would have gone on and built these ovens?

A. Certainly I would.

Q. Without regard to the comfort of these people?

A. I think that is a nonsensical question to me.

Q. I can't furnish you with an appreciation of an answer.

364 A. And I can't furnish you with appreciation as to the proper questions to ask. I think Mr. Rainey has rights in this matter.

Q. I am not arguing Mr. Rainey's rights with you.

A. But you are arguing the matter with me. If they had desired to sell the property, I don't think there would ever have been any trouble—at a reasonable price, at least.

Q. In that interview with these Herbert boys in regard to this property, didn't you advise them to go into the courts and settle their rights?

A. They said they owned this property in front of the house; they said there was a street there and they owned it. I said, "If you own it, Mr. Rainey ought to know it at once, and the sooner he knows it the better, and he should have known it long ago; and they said they were going to apply for an injunction, or sell the property to some one who would do that; and I said the sooner Mr. Rainey knows that the better. I was desirous of having the matter settled before we went too far.

Redirect examination by Mr. SHIRAS:

Q. What is the nearest oven completed and operated, east or west of the house, after the granting of the preliminary injunction re-

straining Mr. Rainey from building or operating ovens in front of or adjacent to the house of the complainants?

A. The nearest oven that is built, or practically built——

Q. Wait. Understand the question. Completed and operated?

A. 160 feet.

Counsel for defendant offers in evidence certified copy of a deed from George W. Herbert *et al.* to Henry Herbert *et ux.*, dated December 3, 1885, executed and acknowledged December 5, 1885, and recorded in the office of the recorder of deeds of Fayette county,
365 on the 12th day of December, 1891, in D. B. vol. —, page —; the same being marked "Exhibit C;" for the purpose of showing, (1st.) that the complainants in this bill are not the present owners of the property and having the right of possession and occupancy of the same; (2nd.) as evidence on the question of jurisdiction as to value, which question is raised in this proceeding.

Counsel for complainants objects to Exhibit C (as well also as to Exhibits A and B) going in evidence before the examiner, the proper practice in offering the same in evidence being in open court at the trial or hearing of the cause, and for the further reason that said exhibits are irrelevant, immaterial and incompetent as evidence in the case.

Testimony closed.
Filed April 6, 1892.

366 STATE OF PENNSYLVANIA, }
County of Allegheny, } *ss:*

Personally before me, —— ——, a notary public, came W. J. Rainey, who, being duly sworn, deposes and says: That he bought title to the premises upon which he is erecting his coke ovens by deed dated December 11th, 1879, recorded in Fayette county January 30th, 1880; that said deed contained no notice of any plan of lot- or streets laid out through the described premises; that I never had any notice or knowledge of the existence of any such plan, streets or ways; that I have known the land and premises in controversy ever since 1879, and that there is no evidence upon the ground of the location of any plan of lots or any streets or ways in, upon, or through the land described in my deed, and that the only road which has been anywhere in the vicinity is the county road, which runs behind the house of the plaintiffs. The location of the road was changed some years ago, when the Pittsburgh and Connellsville railroad was built, but my proposed line of ovens will not infringe either upon the former or present location of said road. The continuance of the injunction will damage me many thousands of dollars for the reason that prior to the filing of the bill I had made all arrangements for the erection of coke ovens on my property and the working of my coal by means of such ovens upon the theory that I had the absolute title in fee to the entire premises conveyed to me by said deed. I am well acquainted with the plaintiffs' property and I know the value thereof from actual experience

of the value of lands in the neighborhood; the entire value of plaintiffs' property as unaffected by any coke ovens whatsoever is not worth over $1,000.

WM. J. RAINEY.

Sworn and subscribed before me this 10th day of September, 1891.

GEORGE E. SHAW,
[SEAL.] *Notary Public.*

367 *Motion for Leave to File Documentary Evidence.*

And now, to wit, May 12th, 1892, the plaintiffs, by their counsel, ask the court for leave to file the following deeds as evidence in this case:

1st. Deed from the Youghiogheny River Oil Company to W. J. Rainey, dated December 11, 1879, and recorded in the office of the recorder of deeds in and for Fayette county, Pennsylvania, in Deed Book —, page —; in which deed is recited a deed of conveyance from the said Youghiogheny River Oil Company, to one Elizabeth Dean, dated March 5, 1872; and also recites a certain other deed of conveyance from the said Youghiogheny River Oil Company to the said Elizabeth Dean, dated September 16, 1873; and also recites a certain other deed of conveyance by the said Youghiogheny River Oil Company to Mrs. Margaret Herbert, dated September 16, 1873; the several — or parcels of land conveyed by the said recited deeds being expressly excepted from the operation of the said deed of conveyance from the said Youghiogheny River Oil Company to the said W. J. Rainey, of December 11, 1879.

2nd. Deed of general warranty from the Youghiogheny River Oil Company to Elizabeth Dean, dated March 5, 1872, and recorded in the office of the recorder of deeds in and for Fayette county, Pennsylvania, on October 29, 1872, in Deed Book, No. 25, pages 596 and 597; conveying "all that lot or piece of ground situate in the new town of Sedgwick, Tyrone township, Fayette county, State of Pennsylvania, numbered in the plot of said town No. 1, containing on Front street 54 feet, 6 inches, and running back along Sedgwick street 200 ft. to Second street;" said lot No. 1 being a part of the premises described in the plaintiffs' bill in this case.

368 3rd. Deed from the Youghiogheny River Oil Company to Elizabeth Dean, dated September 16, 1873, recorded in said recorder's office in Deed Book No. 27, page 88; granting and conveying unto the said Elizabeth Dean lot No. 2, in the said town of Sedgwick, which said lot No. 2 is also a part of the premises described in the plaintiffs' bill.

4th. Deed from Andrew J. Dean and Elizabeth Dean, his wife, to Thomas B. Dean, dated January 27, 1874, and recorded in the said recorder's office in Deed Book No. 27, pages 163 and 164; granting and conveying unto the said Thomas B. Dean the said two lots Nos. 1 and 2, in the said town of Sedgwick.

5th. Deed from the said Thomas B. Dean to Edward Dean, dated

December 26, 1876, recorded in the office of said recorder, in Deed Book No. 32, page 520; granting and conveying unto the said Edward Dean an interest in the said two lots of ground, No. 1 and 2 in the said town of Sedgwick.

6th. Deed from Thomas B. Dean and Edward Dean and his wife to James Cochran, dated November 18, 1879, and recorded in said recorder's office on December 2, 1879, in Deed Book vol. 37, page 197; granting and conveying unto the said James Cochran the said two lots No. 1 and 2 in the said town of Sedgwick.

7th. Deed from James Cochran and wife to George W. and Thomas Herbert, the plaintiffs in this suit, dated November 30, 1885, and recorded December 5, 1885, in the office of said recorder, in Deed Book, vol. 65, page 41; granting and conveying unto the said George W. and Thomas Herbert the said two lots Nos. 1 and 2, in the said town of Sedgwick, being the same lots described in the plaintiffs' bill in this case.

369 The foregoing are same deeds that were filed as evidence in this case on the motion for a preliminary injunction, for the purpose of showing the status of the title of the plaintiffs to the premises in dispute, and for the purpose of showing notice to W. J. Rainey, the defendant, at the time he purchased, of the plaintiffs' rights to the use of Front street and Sedgwick street, in the town of Sedgwick, as set forth in the plaintiffs' bill in this case, and that he purchased with full knowledge of the rights of the owners at the time of his purchase in the said two streets; and the said deeds are now offered as evidence for the same purposes.

The plaintiffs also offer in evidence, by leave of court, a map or drawing, made by S. M. James, and identified by him in his testimony before the examiners, and marked by the examiner "Exhibit No. 2, December 10, 1891, Lucy D. Iams, stenographer;" and also a map or drawing made by said S. M. James, and referred to in his testimony before the examiner, but not identified by the examiner, but marked by the clerk of this court, when filed on the hearing of the motion for a preliminary injunction, "Filed Sept. 25, 1891, H. D. Gamble, clerk." The plaintiffs ask leave to file these drawings as evidence, in connection with the testimony of S. M. James, given before the examiner, having reserved the right to do so in the proceedings before the examiner.

J. M. GARRISON,
Of Counsel for Plaintiff.

To the defendant:

Please take notice that the plaintiffs, by their counsel, will present the foregoing motion to the court on Thursday, May 12, 1892, at 10 o'clock a. m., or as soon thereafter as counsel can be heard.

J. M. GARRISON,
Of Counsel for Plaintiff.

370 May 10th, 1892.—We hereby accept service of the within motion and notice, by copy; and agree that the papers re-

ferred to may be filed subject to the question of their relevancy and competency.

GEO. SHIRAS, 3D,
Attorney for Defendant.

May 13, 1892.—Let the papers referred to in the within motion be filed as evidence in this case, subject to objection as noted in the indorsement hereon.

BY THE COURT.

371 *Deed No.* 1.

This indenture, made the fifth day of March, anno Domini, one thousand eight hundred and seventy-two, between the "Youghiogheny River Oil Company," of the State of Pennsylvania, of the one part, and Elizabeth Dean, of Tyrone township, Fayette county, State of Pennsylvania, of the other part; witnesseth that the said "Youghiogheny River Oil Company" for and in consideration of the sum of one hundred and fifty dollars lawful money of the United States, to them in hand paid by the said Elizabeth Dean at the time of the execution hereof, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, aliened, enfeoffed, released and confirmed, and by these presents do grant, bargain, and sell, alien, enfeoff, release and confirm unto the said Elizabeth Dean, and to her heirs and assigns, all that lot or piece of ground situated in the new town of Sedgwick, Tyrone township, Fayette county, State of Pennsylvania, numbered in the plot of said town No. one (1) containing on Front street fifty-four feet six inches and running back along Sedgwick street two hundred feet to Second street, it being part of the same tract of land purchased by the said Youghiogheny River Oil Company from George B. McCormick and Clarissa, his wife, by their deed dated the sixteenth day of May, A. D., one thousand eight hundred and sixty-five, and recorded in office for recording of deeds in Fayette county, Pennsylvania, in Deed Book, vol. 16, pages 307 and 308 by reference thereto being had will more fully appear. Together with all and singular the buildings, privileges, hereditaments, and appurtenances whatsoever thereunto belonging, or in anywise appertaining, and the reversions and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, property, claim and demand whatsoever of them, the said "Youghiogheny River Oil Company" either in law or equity, of, in and to the same. To have and to hold the said messuage or tenement and lot or piece of ground above described, here-
372 ditaments, and premises hereby granted, and sold, or mentioned or intended so to be with the appurtenances unto the said Elizabeth Dean, her heirs and assigns to and for the only proper use and behoof of her, the said Elizabeth Dean, her heirs and assigns forever. And the said "Youghiogheny River Oil Company" for themselves and their successors, do hereby covenant and agree to and with the said Elizabeth Dean, her heirs and assigns, that they, the said "Youghiogheny River Oil Company," and their successors, all and singular the said hereby-granted premises, with

the appurtenances, unto the said Elizabeth Dean, her heirs and assigns, against them, the said "Youghiogheny River Oil Company," and their successors and against all and every other person and persons whomsoever lawfully claiming or to claim by, from or under them, or any of them, shall and will warrant and forever defend by these presents.

In testimony whereof, the said "Youghiogheny River Oil Company" have hereunto affixed the common seal of their said corporation at Harrisburg, the day and year first above written.

[SEAL.] B. F. CHANDLER, *President.*

Signed, sealed and delivered in the presence of us.
GEO. I. SHOEMAKER.
F. W. T. CAAS.

Received the day of the date of the above-written indenture of the above-named Elizabeth Dean, the sum of one hundred and fifty dollars, being the full consideration money above mentioned,

For the YOUGHIOGHENY RIVER OIL COMPANY,
R. HOGELAND, *Treasurer.*

373 CITY OF HARRISBURG, *ss:*

On the twentieth day of March, A. D. 1872, before me the subscriber, one of the aldermen of the city of Harrisburg, personally appeared B. F. Chandler, president of the Youghiogheny River Oil Company, who being duly sworn deposeth and saith that he was personally present at the execution of the above-written indenture or deed of conveyance and saw the common seal of said corporation of the Youghiogheny River Oil Company, duly affixed thereto and that the said seal so affixed thereto is the common and corporate seal of the said Youghiogheny River Oil Company and that the above-written indenture or deed of conveyance was duly signed, sealed and delivered by and as for the act and deed of the Youghiogheny River Oil Company for the uses and purposes therein mentioned and the name of this deponent subscribed to the said deed in attestation of the due execution and delivering of the said deed is of this deponent's own proper and respective handwriting.

[SEAL.] B. F. CHANDLER, *President.*

Sworn and subscribed the day and year aforesaid before me.
Witness my hand and seal.

F. W. T. CAAS, *Alderman.*

Recorded in the office for the recording of deeds, &c., in and for the said county in Deed Book No. 25, pages 596 and 597.

Given under my hand and the seal of the said office this 29th day of October, A. D. 1872.

[SEAL.] JAMES BEATTY, *Recorder.*

Filed May 13th, 1892.

374 *Deed No. 2.*

This indenture, made the sixteenth day of September, anno Domini, one thousand eight hundred and seventy-three, between the Youghiogheny River Oil Company, of the one part, and Mrs. Elizabeth Dean, of the town of Sedgwick, Tyrone township, Fayette county, and State of Pennsylvania, of the other part, witnesseth: That the said Youghiogheny River Oil Company, for and in consideration of the sum of one hundred and twenty-four dollars, lawful money of the United States, to them in hand paid by the said Elizabeth Dean at the time of the execution hereof the receipt whereof is hereby acknowledged, have granted, bargained and sold, aliened, enfeoffed, released and confirmed, by these presents do grant, bargain and sell, alien, enfeoff, release and confirm unto the said Elizabeth Dean and to her heirs and assigns, all that piece or parcel of land or lot of ground situate in the town of Sedgwick, Tyrone township, Fayette county, State of Pennsylvania, lot (No. 2) two in the plan of the said town, adjoining lot number one, owned by Elizabeth Dean, party hereto and lot No. 3, owned by the party of the first part, containing on Front street, fifty-four feet six inches and running back two hundred feet to Second street, it being part of the same piece of — conveyed to the Youghiogheny River Oil Company, by George B. McCormick and Clarissa, his wife, by their deed of conveyance, dated the sixteenth day of May, anno Domini, one thousand eight hundred and sixty-five, and recorded in the office for recording of deeds at Uniontown, Fayette county, Pennsylvania, in Deed Book, vol. 16, pages 307 and 308, by reference thereto being had will more fully and at large appear. Together with all and singular the buildings, privileges, hereditaments and appurtenances, whatsoever thereto belonging, or in anywise appertaining and the reversions and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property claims and demand whatsoever of them, the said Youghiogheny River
375 Oil Company, either in law or equity, of, in and to the same.

To have and to hold the said messuages or lot of ground above described, hereditaments and premises hereby granted, bargained or sold, or mentioned or intended so to be, with the appurtenances unto the said Elizabeth Dean, her heirs and assigns forever. And the said Youghiogheny River Oil Company, for themselves and their successors, do hereby covenant and agree to and with the said Elizabeth Dean, her heirs and assigns, that they the said Youghiogheny River Oil Company and their successors, all and singular the said hereby-granted premises, with the appurtenances, unto the said Elizabeth Dean, her heirs and assigns, against them the said Youghiogheny River Oil Company and their successors, and against all and every other person and persons whomsoever lawfully claiming or to claim by, from or under them or any of them, shall and will warrant and forever defend by these presents.

In testimony whereof, the president of the Youghiogheny River Oil Company, has hereunto affixed the common seal of the said

corporation at Harrisburg, Pennsylvania, the day and year first above written.

[SEAL.] B. F. CHANDLER, *President.*

Signed, sealed and delivered in the presence of us.
OLIVER EDWARDS.
J. M. KEISTER.

Received the day of the date of the above-written indenture of the above-named Elizabeth Dean, the sum of one hundred and twenty-five dollars, being in full consideration money above mentioned.

R. HOPELAND, *Treasurer.*

376 STATE OF PENNSYLVANIA, } ss:
City of Harrisburg, }

On the sixteenth day of September, A. D., 1873, before me, the subscriber, an alderman, in and for said city of Harrisburg, personally appeared B. F. Chandler, president of the Youghiogheny River Oil Company, — duly sworn deposeth and saith that he was personally present at the execution of the foregoing written indenture or deed of conveyance and saw the common seal of the said corporation of the Youghiogheny River Oil Company, duly affixed thereto, and the said seal so affixed thereto is the common and corporate seal of the said Youghiogheny River Oil Company, and that the foregoing written indenture or deed of conveyance was duly signed, sealed and delivered by and as for the act and deed of the Youghiogheny River Oil Company, for the uses and purposes therein mentioned and the name of this deponent subscribed to the said deed in attestation of the due execution and delivery of the said deed is of this deponent's own proper and respective handwriting. Sworn and subscribed the day and year aforesaid before me.

Witness my hand and seal.

[SEAL.] OLIVER EDWARDS, *Alderman.*

FAYETTE COUNTY, } ss:
Pennsylvania, }

I, David R. Anderson, recorder of deeds in and for said county, do hereby certify the above and foregoing to be a true and correct copy of deed Youghiogheny River Oil Company to Elizabeth Dean as the same appears on the records in my office.

Given under my hand and seal of said office, this 14th day of September, A. D., 1891.

DAVID R. ANDERSON,
Reg. and Rec.

Filed, May 13, 1892.

377 *Deed No.* 2½.

This indenture, made the sixteenth day of September, anno Domini, one thousand eight hundred and seventy-three, between

the Youghiogheny River Oil Company, of the one part, and Mrs. Margaret Herbert, of the town of Sedgwick, Tyrone township, Fayette county, State of Pennsylvania, of the other part.

Witnesseth, that the said Youghiogheny River Oil Company for and in consideration of the sum of three hundred dollars lawful money of the United States to them in hand paid by the said Margaret Herbert at the time of the execution hereof, the receipt whereof is hereby acknowledge-, have granted, bargained, and sold, aliened, enfeoffed, released and confirmod and by these presents do grant, bargain and sell, alien, enfeoff, release and confirm, unto the said Margaret Herbert and to her heirs and assigns, all that piece or parcel of land or two lots of ground situate in the town of Sedgwick, Tyrone township, Fayette county, State of Pennsylvania, numbered seven (7) and eight (8) in the plan of the said town, lot No. seven fronting on Front street, fifty-four feet, six inches and running back to two hundred feet to Second street and adjoining lots No. 6 and No. 8. Lot No. 8 adjoining lot No. 7, and fronting on Front street fifty-four feet, six inches and running back two hundred feet to Second street, being part of the same piece of land conveyed to the Youghiogheny River Oil Company by George B. McCormick and Clarissa his wife, by their deed of conveyance dated the sixteenth day of May, anno Domini, one thousand eight hundred and sixty-five, and recorded in the office for recording of deeds, at Uniontown, Fayette county, Pennsylvania, in Deed Book, vol. 16, pages 307 and 308, by reference thereto being had will more fully and at large appear. Together with all and singular the buildings, privileges, hereditaments, and appurtenances, whatsoever thereunto belonging, or in anywise appertaining, and the reversions
378 and the remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, property, claim, and demand whatsoever of them the said Youghiogheny River Oil Company, either in law or equity, of, in and to the same, to have and to hold the said messuage, or lots or pieces of ground above described, hereditaments and premises hereby granted, bargained and sold, or mentioned or intended so to be, with the appurtenances unto the said Margaret Herbert her heirs and assigns, to and for the only proper use and behoof of her the said Margaret Herbert her heirs and assigns forever.

And the said Youghiogheny River Oil Company for themselves and their successors, do hereby covenant and agree to and with the said Margaret Herbert her heirs and assigns that they the said Youghiogheny River Oil Company, and their successors, all and singular the said hereby granted premises, with the appurtenances unto the said Margaret Herbert, her heirs and assigns, against them the said Youghiogheny River Oil Company and their successors, and against all and every person or persons whomsoever lawfully claiming or to claim by, from, or under them, or any of them, shall and will warrant and forever defend by these presents.

In testimony whereof the president of the Youghiogheny River Oil Company, has hereunto affixed the common seal of the said

corporation at Harrisburg, Pennsylvania, the day and year first above written.

[SEAL.] B. F. CHANDLER, *President.*

Signed, sealed and delivered in the presence of—
OLIVER EDWARDS.
J. M. KREITER.

Received the day of the date of the above-written indenture of the above-named Margaret Herbert the sum of three hundred dollars being in full consideration money above mentioned.

$300. R. HOPELAND, *Treasurer.*

379 STATE OF PENNSYLVANIA, } *ss:*
City of Harrisburg, }

On the sixteenth day of September, A. D., 1873, before me, the subscriber and alderman in and for said city of Harrisburg, personally appeared B. F. Chandler, president of the Youghiogheny *Oil River* Company, who being duly sworn, deposeth and saith, that he was personally present at the execution of the foregoing written indenture or deed of conveyance, and saw the common seal of said corporation of the Youghiogheny River Oil Company, duly affixed thereto, is the common and corporate seal of said Youghiogheny River Oil Company, and that the foregoing written indenture or deed of conveyance was duly signed and delivered by and as for the act and deed, of the Youghiogheny River Oil Company, for the uses and purposes therein mentioned, and the name of this deponent subscribed to the said deed, in attestation of the due execution and delivery of the said deed is of this deponent's own proper and respective handwriting.

Sworn and subscribed the day and year aforesaid, before me, witness my hand and seal.

[SEAL.] OLIVER EDWARDS, *Alderman.*

FAYETTE COUNTY, *ss:*

Recorded in the office for recording deeds, etc., in and for said county, in Deed Book No. 27, page 99.

Given under my hand and the seal of the said office this 20th day of December, A. D., 1873.

JOS. BEATTY, *Recorder.*

380 *Deed No.* 3.

This indenture, made the twenty-seventh day of January, in the year of our Lord, one thousand eight hundred and seventy-four, between Elizabeth Dean, of Tyrone township, Fayette county, and State of Pennsylvania, of the first part, and Thomas B. Dean, of Henry Clay township, and county and State aforesaid, of the second part; witnesseth, that the said party of the first part, for and in consideration of the sum of eight hundred dollars, lawful money of the United States of America, unto her well and truly paid by the

said party of the second part, at or before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, *have* granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents *do* grant, bargain, sell, alien, enfeoff, release, convey and confirm unto the said party of the second part, his heirs and assigns. All that lot or piece of land situated in the new town of Sedgwick, in Tyrone township, Fayette county, and State of Pennsylvania, being No-. one and two, containing on Front street fifty-four feet six inches and running back along Sedgwick street, and No. 2 lot, the same size of lot No. one and lying on the east side of No. one it being a part of a larger tract of land purchased by the Youghiogheny River Oil Company of George McCormick and wife, and by them conveyed to Elizabeth Dean, and by this indenture conveyed by her to Thomas B. Dean. Together with all and singular the buildings, improvements, ways, waters, water courses, rights, liberties, privileges, hereditaments and appurtenances whatsoever thereunto belonging or in anywise appertaining and the reversions and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, property claim and demand whatsoever of the said party of the first part, in law, equity or otherwise howsoever, of, in and to the same and every part thereof to have and to hold the said two described lots No. one, containing a frame house hereditaments and premises hereby granted, or mentioned
381 and intended so to be, with the appurtenances unto the said party of the second part, his heirs and assigns to and for the only proper use and behoof of the said party of the second part, his heirs and assigns forever. And she, the said Elizabeth Dean and Andrew Dean, her husband, the said party of the first part, for themselves, heirs, executors and administrators by these presents, covenant, grant and agree to and with the said party of the *said party of the* second part, his heirs and assigns, that she, the said party of the first part, her heirs, all and singular the hereditaments and premises hereinabove described and granted or mentioned and intended so to be with the appurtenances, unto the said party of the second part, his heirs and assigns against them, the said party of the first part and their heirs and against all and every other person or persons whomsoever lawfully claiming or to claim the same or any part thereof shall and will warrant and forever defend.

In witness whereof, the said party of the first part, have to these presents set their hands and seals, dated the day and year first above written.

her
ELIZABETH x DEAN. [SEAL.]
mark.
A. J. DEAN. [SEAL.]

Signed, sealed and delivered in the presence of us—

W. H. COTTOM.
G. W. CRAWFORD.

FAYETTE COUNTY, *ss:*

On this 27th day of Jan., A. D., 1874, before me, W. H. Cottom, came the above-named Elizabeth Dean and acknowledged the foregoing indenture to be her act and deed, desiring the same to be recorded as such.

Witness my hand and seal, the day and year aforesaid.

W. H. COTTOM,

[SEAL.] *Justice of the Peace.*

382 Received, the day of the date of the above indenture of the above-named — the sum of — dollars, lawful money of the United States, being the consideration money above mentioned in full.

—— ——.

Witness:

—— ——.

FAYETTE COUNTY, *ss:*

. On this 27th day of January, A. D. 1874, before me, W. H. Cottom, a justice of the peace, came the above-named Elizabeth Dean and Andrew Dean, and acknowledged the above indenture to be their act and deed, and desired the same to be recorded as such. She, the said Elizabeth Dean being of full age and by me examined separate and apart from her said husband and the contents of the said indenture being first made fully known to her declared that she did of her own free will and accord sign and seal, and as her act and deed, deliver the same without any coercion or compulsion of her said husband.

Witness my hand and seal the day and year aforesaid.

W. H. COTTOM,

[SEAL.] *Justice of the Peace.*

Recorded and compared January 29th, A. D., 1874.

PENNSYLVANIA, }
Fayette County, } *ss:*

I, David R. Anderson, recorder of deeds, in and for said county, do hereby certify the above and foregoing to be a true and correct copy of a deed as the same appears of record in my office.

Given under my hand and seal of said office, this 14th day of September, A. D., 1891.

[SEAL.] D. R. ANDERSON, *Recorder.*

Filed, May 13th, 1892.

383 *Deed No.* 4.

This deed made this 26th day of December in the year of our Lord, 1876, between Thomas B. Dean grantor of the first part, and Edward Dean grantee of the second part, all of Fayette county and State of Pennsylvania. Witnesseth that in consideration of the sum

of twelve hundred dollars, this receipt whereof is hereby acknowledged paid in hand. The said grantor do grant with general warranty against any person or persons claiming through him or by him unto the said grantee all of the following-described two lots of land, lying in Tyrone township, and county of Fayette, and State of Pennsylvania, being the same lots that *was* conveyed by Youghiogheny River Oil Company, to Elizabeth Dean, and bound- as follows: Beginning at Front street in the town — Sedgwick, in the county of Fayette, and State of Pennsylvania, lot No. one containing on Front street, fifty-four feet and 6 inches, and running back to Sedgwick street two hundred feet, also lot No. two as laid down in town plot with all and every of the appurtenance and privileges thereto in any manner belonging to and the said grantor covenants that he has a good right to convey the said described lots of land in manner and form as aforesaid.

Witness the following signature and seal.

(Signed) THOMAS B. DEAN.

Attest: SEBASTAIN R. SEESE.

STATE OF PENNSYLVANIA,
And County of Fayette, Township of Henry Clay.

This day personally come Thomas B. Dean, before me a
384 justice of the peace, and acknowledged the within deed to be his deed and act and wished the same to be recorded, given under my hand this the 26th day of December 1876.

[SEAL.] J. O'HEGARTY, *J. P.*

FAYETTE COUNTY, *ss:*

Recorded in the office for recording of deed- &c., in and for said county in Deed Book vol. 32, page 520.

Given under my hand and the seal of said office, at Uniontown this 4th day of May, A. D. 1877.

[SEAL.] JOHN W. DARBY, *Recorder.*

Filed May 13, 1892.

385 *Deed No. 5.*

This indenture, made the eighteenth day of November in the year of our Lord one thousand eight hundred and seventy-nine, between Thomas B. Dean, Edward Dean and Mary Ann his wife all of Henry Clay township, Fayette county, Pennsylvania, of the first part, and James Cochran of Lower Tyrone township, county and State aforesaid of the second part; witnesseth, that the said part- of the first part, for and in consideration of the sum of four hundred dollars lawful money of the United States of America, unto them well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, en-

feoffed, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release, convey and confirm unto the said party of the second part, his heirs and assigns, all those two certain lots or parcels of land situate in the new town of Sedgwick, Lower Tyrone township, Fayette county, Pennsylvania, numbered on the plot of said town number one (1) and two (2) and taken together, containing on Fourth street one hundred and nine feet and extending back the same width two hundred feet to Second street between Sedgwick street on the one side and lot number three on the other side. Said two lots are parts of a tract of land which was conveyed by George B. McCormick and wife to the Youghiogheny River Oil Company by deed dated May 16, 1865, recorded in the recorder's office of said county in Deed Book, No. 16, page- 307 and 308 and the Youghiogheny River Oil Company by deed dated March 5, 1872, recorded in said office in Deed Book No. 25, pages 596 and 597 granted and conveyed said lot number one to Elizabeth Dean and said company by deed dated September 16, 1873, recorded in said office in Deed Book No. 27, page 88 granted and conveyed said lot number two to Elizabeth Dean—who with her husband Andrew J. Dean by deed dated January 27, 1874, recorded in
386 said office in Deed Book No. 27 pages 163 and 164, granted and conveyed said two lots to said Thomas B. Dean, who by deed dated December 26, 1876, recorded in said office in Deed Book No. 32, page 520, granted an interest in said two lots to said Edward Dean. Together with all and singular the buildings, improvements, ways, waters, water-courses, rights, liberties, privileges, hereditaments and appurtenances whatsoever thereunto belongs or in anywise appertaining, and the reversions and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, property, claim and demand whatsoever, of the said parties of the first part, in law, equity or otherwise howsoever, of, in and to the same and every part thereof; to have and to hold the said two lots of land, hereditaments and premises hereby granted, or mentioned, and intended so to be, with the appurtenances, unto the said party of the second part, his heirs and assigns, to and for the only proper use and behoof of the said party of the second part, his heirs and assigns, forever. And the said Thomas B. Dean and Edward Dean two of the said parties of the first part, for themselves their heirs, executors and administrators, do by these presents, covenant, grant and agree to and with the said party of the second part his heirs and assigns, that they the said parties of the first part, and their heirs, all and singular the hereditaments and premises hereinabove described and granted, or mentioned, and intended so to be, with the appurtenances, unto the said party of the second part, his heirs and assigns, against them the said parties of the first part, and their heirs, and against all and every other person or persons whomsoever, lawfully claiming or to claim the same or any part thereof, shall and will warrant and forever defend.

In witness whereof, the said parties of the first part, have to these

presents set their hands and seals dated the day and year first above written.

THOMAS B. DEAN. [SEAL.]
EDWARD DEAN. [SEAL.]
MARY ANN DEAN. [SEAL.]

Signed, sealed, and delivered in presence of us—
J. O'HEGARTY.
MARY A. THOMAS.

387 PENNSYLVANIA, } ss:
Fayette County, }

On this 19th day of November, A. D. 1879, before me, a justice of the peace, in and for said county, personally came the above-named Thomas B. Dean, Edward Dean and Mary Ann his wife and acknowledged the above indenture to be their act and deed, and desired the same to be recorded as such.

She, the said Mary Ann being of full age, and by me examined separate and apart from her said husband, and the contents of the said indenture being first made fully known to her, declared that she did, of her own free will and accord, sign and seal, and as her act and deed, delivered the same, without any coercion or compulsion of her said husband.

Witness my hand and seal, the day and year aforesaid.

[SEAL.] J. O'HEGARTY, *J. P.*

COMMONWEALTH OF PENNSYLVANIA, } ss:
County of Fayette, }

Recorded on this 2d day of December, A. D. 1879, in the recorder's office of the said county, in Deed Book, vol. 37, page 193.

Given under my hand and the seal of said office, the day and year aforesaid.

[SEAL.] JOHN W. DARBY, *Recorder.*

Filed May 13, 1892.

388 *Deed No.* 5½.

The Youghiogheny River Oil Company }
to }
W. J. Rainey. }

This indenture made the eleventh day of December, the year of our Lord, one thousand eight hundred and seventy-nine, between the Youghiogheny River Oil Company of the one part and W. J. Rainey, of the city of Cleveland, Cuyahoga county, State of Ohio, of the other part. "Witnesseth," whereas the Commonwealth of Pennsylvania by patent dated the nineteenth day of December, A. D. 1787, granted unto Alexander McClintock a certain tract of land (warranted in the name of said McClintock, called the Boat Harbour, situated and lying in Tyrone township, Fayette county, Pennsylvania, contain-

ing one hundred and thirty-two acres and allowance. And whereas, by sundry good and sufficient mesne conveyances, the title to eighty-three acres and one hundred and fifteen perches of said tract of land became vested in Jacob J. Anderson, who with his wife Nancy, by deed dated the thirteenth day of June, A. D. 1837, recorded in the recorder's office of Fayette county, Pennsylvania, in Deed Book, vol. —, page 42, conveyed the same to John Taylor and Jacob Newmyer, who by their deed dated February 29th, A. D. 1840, recorded in the recorder's office of Fayette county, in Deed Book, vol. —, page 81, made partition thereof whereby the title to thirty acres, the eastern part of said tract became vested in said John Taylor, and the title of fifty-three acres and one hundred and fifteen perches, the western part of said tract, became vested in said Jacob Newmyer in severalty. And whereas, the said Jacob Newmyer at sundry times conveyed and granted out of the said land so as aforesaid set apart and assured to him. First, twenty acres thereof to Tilghman H. Strickler. Second, the right of way for a railroad over the part hereinafter conveyed, to the Pittsburgh & Connellsville Railroad Company.
389 Third, one-half acre of land, and the right of way for a coal railroad over the part hereinafter conveyed to Solomon Kreester and James Cochran. And whereas the said Jacob Newmyer by his last will and testament proved the 28th day of November, 1864, recorded in the register's office of Fayette county, Pennsylvania, in Will Book No. 4, page 85, devised to his daughter Clarissa, now Clarissa McCormick, his farm situate near the Youghiogheny river known as the Saw Mill place, containing thirty-four acres strict measure, being a part of the tract of land hereinbefore described. And whereas, the said Clarissa McCormick and George B. McCormick her husband conveyed the same premises to the Youghiogheny River Oil Company (party hereto) by their — dated the sixteenth day of May, A. D. 1865, and recorded in the recorder's office of Fayette county, Pennsylvania, in Deed Book, vol. 16, pages 307 and 308, reference thereto being had will more fully and at large appear. And whereas, the said Youghiogheny River Oil Company did convey at sundry times part of the same premises, "to wit:" A small piece or parcel of land containing fifty-four feet, six inches front, (fronting toward the Pittsburgh & Connellsville railroad) and extending back the same width a distance of two hundred feet to Elizabeth Dean — deed dated March 5th, A. D. 1872. Also, a small piece or parcel of land adjoining the above-described piece of land containing fifty-four feet six inches frontage extending back the same width a distance of two hundred feet to Elizabeth Dean by deed dated September 16, 1873. Also a small piece or parcel of land beginning at a point or stake on the southeastern line of the before-described farm fifty feet from the line of the Pittsburgh & Connellsville railroad a distance of one hundred and nine feet fronting toward said railroad (the front line of the before-described lots being on a parallel line with this lot) and extending back along said before-mentioned line a distance of two hundred feet of the same width by deed to Mrs. Margaret Herbert, dated the sixteenth

day of September, A. D. 1873. Now this indenture, witnesseth, that the Youghiogheny River Oil Company for and in con-
390 sideration of the sum of six thousand dollars lawful money of the United States to them well and truly paid, by the said W. J. Rainey at or before the sealing and delivery of these presents the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed and by these presents does grant, bargain, sell, alien and enfeoff, release, convey and confirm unto the said W. J. Rainey, his heirs, and assigns, all that certain farm, messuage, tenement and tract of land situate on the Youghiogheny river, in Tyrone township, Fayette county, Pennsylvania, containing thirty-four acres, more or less, and hereinbefore described, adjoining lands of Graff, Bennet and Co., William Huston and Jacob Hull, exempting however therefrom the several pieces or lots of land hereinbefore mentioned as having been granted and conveyed by the said The Youghiogheny River Oil Company, unto Elizabath Dean, and Mrs. Margaret Herbert, together with all and singular, the privileges, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property, claim and demand whatsoever of them the said The Youghiogheny River Oil Company, either in law or equity, of, in, and to the same, to have and to hold the said farm, messuage, tenement and tract of land above described hereditaments and premises, hereby granted, bargained and sold or mentioned or intended so to be with the appurtenances unto the said W. J. Rainey, his heirs, and assigns to and for the only proper use and behoof of him, the said W. J. Rainey, his heirs and assigns forever. And the said The Youghiogheny River Oil Company for themselves and their successors do hereby covenant and agree, to and with the said W. J. Rainey, his heirs and assigns, that they the said The Youghiogheny River Oil Company and their successors, all and singular, the said hereby-granted premises with the appurtenances unto the said W. J. Rainey, his heirs and assigns, against them the said The Youghiogheny River Oil Company and its successors and against all and every other
391 person whomsoever lawfully claiming or to claim, by, from or under them, (except to the several grants and conveyances thereout and therefrom) shall and will warrant and forever defend by these presents. In testimony whereof, the president of the Youghiogheny River Oil Company, has hereunto affixed the common seal of the said corporation, at Harrisburg, Pennsylvania, the day and year first above written.

B. F. CHANDLER, *President.*

[Y. R. O. CO., SEAL.]

Sealed and delivered in the presence of—
D. C. MAURER.

Received the day of the date of the above indenture from W. J. Rainey, six thousand — in full consideration money mentioned.
$6,000.

J. M. KREITER,
Sec. and Treas. Youg. River Oil Co.

STATE OF PENNSYLVANIA, } ss:
City of Harrisburg, }

On the 11th day of December, A. D. 1879, before me, the subscriber, an alderman in and for said city of Harrisburg, personally appeared B. F. Chandler, president of the Youghiogheny River Oil Company, who being duly affirmed deposeth and saith that he was personally present at the execution of the foregoing written indenture or deed of conveyance and saw the common seal of the said corporation of the Youghiogheny River Oil Company duly affixed thereto; and the said seal so affixed thereto is the common and corporate seal of the Youghiogheny River Oil Company; that the foregoing written indenture or deed of conveyance was duly signed, sealed and delivered by and as the act and deed of the Youghiogheny River Oil Company for the uses and purposes therein mentioned; and
392 the name of this deponent subscribed to the said deed in attestation of the due execution and delivery of the said deed is of this deponent's own proper and respective handwriting. Affirmed and subscribed the day and year aforesaid before me,

[SEAL.] D. C. MAURER, *Alderman.*

Recorded and compared January 30, 1880.

FAYETTE COUNTY, ss:

I, David R. Anderson, recorder of deeds for Fayette county, Pa., do certify the foregoing to be a true copy of a deed of record in my office, as witness my hand and seal of said office this 13th day of August, A. D. 1891.

[SEAL.] DAVID R. ANDERSON, *Recorder.*

Filed May 13, 1892.

393 *Deed No. 6.*

This indenture, made the 30th day of November, in the year of our Lord, one thousand eight hundred and eighty-five, between James Cochran and Clarissa, his wife, of Lower Tyrone township, Fayette county, Pennsylvania, of the first part and George W. Herbert and Thomas Herbert, of same township, county and State, of the second part; witnesseth, that the said parties of the first part, for and in consideration of the sum of one thousand dollars, lawful money of the United States of America, unto them well and truly paid by the said parties of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents, do grant, bargain, sell, alien, enfeoff, release, convey and confirm, unto the said parties of the second part, their heirs and assigns, forever. All those two certain lots or parcels of land situate in the new town of Sedgwick, Lower Tyrone township, Fayette county, Pennsylvania, numbered on the plot of said town, numbers one (1) and two (2), and taken together, containing on Front street one hundred and nine feet and extending back the same width two hundred feet to Second street between Sedgwick street on the one side and lot num-

ber three on the other side. Said two lots are parts of a tract of land which was conveyed by George B. McCormick and wife to the Youghiogheny River Oil Company, by deed dated May 16, 1865, recorded in the recorder's office of said county, in Deed Book No. 16, pages 307 and 308, and the Youghiogheny River Oil Company by deed dated March 5, 1872, recorded in said office in Deed Book No. 25, pages 596 and 597, granted and conveyed said lot number one to Elizabeth Dean and said company by deed dated September 16, 1873, recorded in said office in Deed Book No. 27, page 88, granted and conveyed said lot number two to Elizabeth Dean, who with her husband, Andrew J. Dean, by deed dated January 27, 1874,
394 recorded in said office in Deed Book No. 27, pages 163 and 164, granted and conveyed said two lots to Thomas B. Dean, who by deed dated December 26, 1876, recorded in said office in Deed Book No. 32, page 520, granted an interest in said two lots to Edward Dean, and being the same two lots of land which Thomas B. Dean and Edward Dean and wife by deed dated Nov. 18, 1879, and recorded in recorder's office of said county in Deed Book No. 37, page 193, granted and conveyed to said James Cochran, party hereto. Together with all and singular the buildings, improvements, ways, waters, water-courses, rights, liberties, privileges, hereditaments, and appurtenances whatsoever thereunto belonging or in anywise appertaining, and the reversions and remainders, rents, issues, and profits thereof; and all the estate, right, title, interest, property, claim and demand whatsoever of the said parties of the first part, in law, equity or otherwise, howsoever, of, in and to the same and every part thereof, to have and to hold the said two lots of land, hereditaments and premises hereby granted, or mentioned, and intended so to be, with the appurtenances, unto the said parties of the second part, their heirs and assigns, to and for the only proper use and behoof of the said parties of the second part, their heirs and assigns forever. And James Cochran, one of said parties of the first part, for himself, his heirs, executors and administrators, doth by these presents, covenant, grant and agree to and with the said parties of the second part, their heirs and assigns, that they the said parties of the first part, their heirs all and singular the hereditaments and premises hereinabove described and granted, or mentioned, and intended so to be, with the appurtenances, unto the said parties of the second part, their heirs and assigns, against them the said parties of the first part, and their heirs, and against all and every other person or persons whomsoever, lawfully claiming or to claim the same or any part thereof, shall and will warrant and forever defend.

395 In witness whereof the said parties of the first part have to these presents set their hands and seals. Dated the day and year first above written.

JAMES COCHRAN. [SEAL.]
CLARISSA COCHRAN. [SEAL.]

Signed, sealed, and delivered in presence of us—
MATTHEW B. FRYER.
JOHN T. COCHRAN.

PENNSYLVANIA, } ss:
County of Fayette, }

On this 30th day of November, A. D. 1885, before me, a justice of the peace, in said county, came the above-named James Cochran and Clarissa, his wife, and acknowledged the foregoing indenture to be their act and deed, and desire the same to be recorded as such.

She, the said Clarissa, being of full age, and by me examined separate and apart from her said husband, and the contents of the said indenture being first made fully known to her, declared that she did, of her own free will and accord, sign and seal, and as her act and deed, deliver the same, without any coercion or compulsion of her said husband.

Witness my hand and seal, the day and year aforesaid.

[SEAL.] M. B. FRYER.

COMMONWEALTH OF PENNSYLVANIA, } ss:
County of Fayette, }

Recorded on this 5th day of December, A. D. 1885, in the recorder's office of the said county, in Deed Book, vol. 66, page 41.

396 Given under my hand and the seal of the said office, the day and year aforesaid.

[SEAL.] CHAS. D. CONNER, *Recorder.*

Filed May 13, 1892.

397 *Deed No. 7.*

This indenture made the first day of June in the year of our Lord, one thousand and eight hundred and eighty-nine, between James Cochran of the county of Fayette, in the Commonwealth of Pennsylvania, and Clarrisa, his wife, parties of the first part, and William J. Rainey of the city of Cleveland, *and in the city of Cleveland,* and in the State of Ohio, party of the second part: Witnesseth that the said parties of the first part, for and in consideration of the sum of ninety-two thousand five hundred ($92,500) dollars lawful money of the United States of America unto them well and truly paid by the said party of the second part, at or before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, enfeoff, release, convey and confirm unto the said party of the second part, his heirs and assigns forever. All the estate, right, title and interest, claim, property, and demand of them, the said parties of the first part, of, in and to the following-described lands, tenements and hereditaments, situate in the county of Fayette aforesaid, severally bounded and described as follows: First. All that certain tract of land situate in the township of Lower Tyrone, county of Fayette, beginning at stones on the Youghiogheny river, thence by lands of Jacob Bowers and others north

twenty and three-fourths (20¾) degrees, east thirty-two (32) perches to stones and north seventy and one-half (70½) degrees, east seventy-three and five-tenths (73.5) perches to stones: The by-lands of John R. Strickler's heirs north fifty-nine (59) degrees, west one hundred forty-nine and two-tenths (149.2) perches to a post, thence by lands of Wm. Huston's, south thirty-three and one-half (33½) degrees, west twenty-nine and two-tenths (29.2) perches to stones, north sixty-six (66) degrees west, twenty-nine and fifty-five one-hundredths (29.55) perches to a post, thence by land now or late of Jacob Newmyer,
398 south thirty-five (35) degrees, west ninety-three (93) perches to stones on bank of the Youghiogheny river, thence up said river by the several courses thereof to the place of beginning, containing one hundred acres, more or less, together with all and singular the coal which may remain unmined therein and the coke works and other fixtures thereto pertaining, and also the houses and improvements of every kind, and the hereditaments and appurtenances to the said land and property belonging, subject to a conveyance of one-fourth of an acre of said land to the school directors for a school-house, and subject to the right of way in and over the same of the Pittsburgh & Connellsville Railroad Company. Second. All that certain parcel of land situate in the township of Lower Tyrone aforesaid, bounded and described as follows: Beginning at stones, a corner on line of land of Miltonberger's heirs, thence by land now or late of Stewart Strickler, north eighteen and three-fourth- (18¾) degrees, west one hundred and sixty-nine (169) perches to stones, thence by lands of Miltonberger's heirs, south fifty-four (54) degrees, west ninety-six perches to stones, north forty-six (46) degrees, west one hundred and eighteen and six-tenths (118.6) perches to a red oak, south thirty-seven (37) degrees, west one hundred twenty-three and four-tenths (123.4) perches to a post, south sixty (60) degrees, east one hundred eight and eight-tenths (108.8) perches to a post, south fourteen and one-half (14½) degrees, east twenty-seven (27) perches to a stone, south seventy (70) degrees, east thirty (30) perches to a white oak, and south eighty-four (84) degrees, east one hundred thirty-eight and six-tenth- (138.6) perches to the place of beginning, containing one hundred seventy-five acres, more or less. Third. All the coal and other minerals lying in and under the farm or tract of land in Dunbar township, in said county, now or formerly owned and occupied by James and John D. Collins, known as Fort Hill, bounded and described as follows, to wit: Beginning at a stone, a corner of Alexander J. Hill's land, north forty-eight (48) degrees, east ninety-five (95) perches to a stone, thence south sixty-three and one-fourth (63¼) degrees, east thirty-
399 nine and six-tenths (39.6) perches to a stone, thence south seventeen and three-fourths (17¾) degrees, west twenty-four and two-tenths (24.2) perches to a stone, thence south forty-three and three-fourths (43¾) degrees, east one hundred seventy-four and five-tenths (174.5) perches to a white oak, a corner of James Patterson's land, thence by said Patterson's land south sixty-two (62) degrees, west thirty-four and four-tenths (34.4) perches to

stones, thence by the same north thirty-six (36) degrees, west fifteen and seven-tenths (15.7) perches to stones, thence by the same south sixty-seven (67) degrees, west one hundred one and four-tenths (101.4) perches to stones, thence south eleven (11) degrees east thirty-one and six-tenths (31.6) perches to stones, thence south seventy-three and one-fourth (73¼) degrees, west forty-eight and eight-tenths (48.8) perches to stones, thence south three and one-half (3½) degrees, east seventy-three (73) perches, thence south seventy-three and one-fourth (73¼) degrees, west ninety-seven and two-tenths (97.2) perches to a white oak, thence by land of Alexander J. Hill north eight and one-half (8½) degrees, east two hundred and ninety-eight perches to a stone, the place of beginning, containing two hundred eighty acres, more or less. Fourth. The right of way from the Youghiogheny river through the two coal drifts known in Gregg's plan of drifts as numbers eighty (80) and eighty-one (81), being the two upper drifts formerly owned by Henry Walter, and being one rod each in width and extending back to line of said Collins' land as before described (for description see Deed Book, vol. 12, page 438). Fifth. All the stone coal which may remain unmined in the following-described parcel of land, situate in Lower Tyrone township aforesaid, bounded and described as follows, to wit: Beginning at stones at the corner of lands formerly of the Fayette Coal Company, thence by said lands and land now or late of John M. Cochran and Company north thirty-three and one-half (33½) degrees, east ninety-four and two-tenths (94.2) perches to a post, thence by lands of James Cochran and Solomon
400 Keister north eighty-two and three-fourths (82¾) degrees, west twenty-one and sixteen one-hundredths (21.16) perches to a hickory, south sixty-seven and one-half (67½) degrees, west sixteen and six-tenths (16.6) perches to a white oak, south forty-five (45) degrees, west thirty-two (32) perches to a post, south seventy and three-fourths (70¾) degrees, west seventeen and sixty-four one-hundredths (17.64) perches to a white oak, south three-eighths (⅜) of a degree, west thirty-six and six-tenths (36.6) to a hickory, thence by lands formerly of the Fayette Coal Company, south sixty-seven and one-half (67½) degrees, east twenty-five and eight-tenths (25.8) perches to the place of beginning, containing eighteen acres, one hundred five perches, more or less. Sixth. All the stone coal in that certain piece or parcel of land adjoining the last above-described piece or parcel, and lying between the second, third, fourth, fifth and sixth lines in the last above description on the one side, and a small stream known as Hickman's run on the other, supposed to contain two acres, more or less. Seventh. All those thirty-nine (39) coal drifts in the plan of Thomas Gregg, as laid out on the Youghiogheny river, in Dunbar township, in said county and State, being one rod in front for each drift, and running back about thirty (30) rods to the Collins line, said drifts being known in said plan by numbers forty-one (41), forty-three (43), forty-four (44), forty-five (45), forty-six (46), forty-seven (47), forty-eight (48), forty-nine (49), fifty (50), fifty-one (51), fifty-two (52), fifty-three (53), fifty-four (54), fifty-five (55), fifty-six (56), fifty-seven (57), fifty-

eight (58) fifty-nine (59), sixty (60), sixty-one (61), sixty-two (62), sixty-three (63), sixty-four (64), sixty-five (65), sixty-six (66), sixty-seven (67), sixty-eight (68), sixty-nine (69), seventy (70), seventy-one (71), seventy-two (72), seventy-three (73), seventy-four (74), seventy-five (75), seventy-six (76), seventy-seven (77), seventy-eight (78), seventy-nine (79) and eighty (80). Subject nevertheless to the right of way through the upper drifts, being numbered as seventy-nine (79) and eighty (80) for use of James and John D. Collins, or their assigns, as per agreement of Henry
401 Walter and said Collins, that is the right of way after the coal is taken and subject to the right of way over said coal drifts as granted to the Pittsburgh and Connellsville Railroad Company by instrument of writing dated the 16th day of March, 1881. Recorded in the recorder's office of Fayette county in Deed Book, vol. 43, page 267. Eighth: Those certain two lots of ground, situate in the town of Sedgwick, township of Lower Tyrone, in the county aforesaid, being the lots Nos. seven (7) and eight (8) in the plan of said town, bounded and described as follows, viz: Lot No. 7 fronting fifty-four feet and six inches on Front street and running back two hundred feet to Second street and adjoining lot No. 6 and lot No. 8 aforesaid, lot No. 8 fronting fifty-four feet and six inches on Front street and running back two hundred feet to Second street and adjoining lot No. 7, above described. The interest of the parties of the first part in the above-described, seven parcels of land being the undivided one-third and the undivided twenty-five thirty-seconds of one-third and being the same which became vested in said parties of the first part by virtue of the following deeds: 1st deed from John Z. Speer and wife dated the 10th day of July, A. D., 1874 recorded in the recorder's office of said Fayette county in Deed Book, vol. 29, page 360; 2nd deed from Charles L. Fitzhugh, dated the 28th day of January, A. D., 1880, recorded in the recorder's office aforesaid, in Deed Book, vol. 38, page 164; 3rd deed from John H. Shoenberger, dated the 30th day of January, A. D. 1880, recorded in the recorder's office aforesaid in Deed Book, vol. 38, page 168; 4th deed from George K. Shoenberger and wife, dated the 2nd day of February, A. D. 1880, recorded in the recorder's office aforesaid in Deed Book, vol. 40, page 184; 5th deed from John H. Bailey, assignee, *et al.*, dated the 12th day of November, A. D. 1888, recorded in the recorder's office aforesaid in Deed Book, vol. 81, page 108; 6th deed from P. Harvey Miller, trustee, *et al.*, dated the 19th day of November, A. D. 1888, recorded in the recorder's office aforesaid in
402 Deed Book, vol. 81, page 115; 7th deed from James W. Friend and wife, dated the 22nd day of November, A. D. 1888, recorded in the recorder's office aforesaid in Deed Book, vol. 80, page 149. And the title to the eighth described lot of ground became vested in the said parties of the first part by virtue of a deed from Henry Herbert and wife dated the 28th day of November, A. D., 1879, recorded in the recorder's office aforesaid in Deed Book, vol. 37, page 195, together with all and singular, the improvements, ways, waters, water-courses, rights, liberties, privileges, hereditaments and appurtenances whatsoever thereunto belonging or in

anywise appertaining and the reversions and remainders rents, issues and profits thereof and all the estate, right, title and interest, property claim and demand whatsoever of the said parties of the first part thereof, to have and to hold the said described premises with the hereditaments and premises hereby granted or mentioned, and intended so to be, with the appurtenances unto the said party of the second part his heirs and assigns, to and for the only proper — and behoof of the said party of the second part, his heirs and assigns forever. And James Cochran, one of the said parties of the first part, for himself, his heirs, executors and administrators, does by these presents, covenant, grant and agree to and with the said party of the second part his heirs and assigns, that they, the said parties of the first part and their heirs, all and singular the hereditaments and premises hereinabove described, and granted or mentioned and intended so to be with the appurtenances, unto the said party of the second part, his heirs and assigns against them the said parties of the first part and their heirs, and against all — every other person or persons whomsoever lawfully claiming or to claim the same or any part thereof, shall and will warrant and forever defend.

In witness whereof the said parties of the first part have to these presents set their hands and seals, dated the day and year first above written.

JAMES COCHRAN. [SEAL.]
CLARISSA COCHRAN. [SEAL.]

403 Signed, sealed, and delivered in presence of—
JOHN L. COCHRAN.
C. O. SCHRAYER.

Received the day of the date of the above indenture of the above-named William J. Rainey the sum of ninety-two thousand five hundred dollars ($92,500), lawful money of the United States, being the consideration money above mentioned in full.

JAMES COCHRAN.

Witness:
GEORGE C. BURGIVEN.

COMMONWEALTH OF PENNSYLVANIA, } ss:
Fayette County, }

On this first day of June, A. D., 1889, before me, a notary public in and for said county, came the above-named James Cochran and Clarissa, his wife, and acknowledged the foregoing indenture to be their act and deed and desired the same to be recorded as such, and the said Clarissa Cochran, being of full age, and by me examined separate and apart from her said husband, and the contents of said indenture, being first made fully known to her, declared that she did, voluntarily of her own free will and accord, sign and seal, and as her act and deed, deliver the same, without any coercion or compulsion of her said husband.

Witness my hand and official seal the day and year aforesaid.

[NOTARIAL SEAL.] C. O. SCHRAYER, [SEAL.]
Notary Public.

404 FAYETTE COUNTY, } ss:
Pennsylvania, }

I, David R. Anderson, recorder of deeds, &c., in and for said county, do hereby certify that the above and foregoing is a true and correct copy of deed, James Cochran, *et ux.*, to William J. Rainey, as the same appears on the records in my office.

Given under my hand and seal of said office this 18th day of September, A. D., 1891.

[SEAL.] DAVID R. ANDERSON, *Recorder.*

Filed May 13, 1892.

405 DEFENDANT'S EXHIBIT C.

George W. Herbert *et al.* }
to
Henry Herbert *et ux.* }

This indenture, made this third (3) day of December, 1885, between George W. Herbert and Thomas Herbert, of Lower Tyrone township, Fayette county, Pennsylvania, of the first part, and Henry Herbert and Margaret, father and mother of said first parties of the same township, county and State, parties of the second part, witnesseth, That said first parties for and in consideration of natural love and affection and of other good and lawful considerations, have demised, leased and let and by these presents do demise, lease and let unto said second parties, all those two certain lots of land situate in Lower Tyrone township, aforesaid, sold and conveyed to said first parties by James Cochran and wife, and described as follows, to wit: To have and to hold the same for and during the term of their natural lives and the natural life of the survivor of them the said parties of the second part, with the appurtenances.

In witness whereof, said first parties have hereunto set their hands and seals the date aforesaid.

GEORGE W. HERBERT. [SEAL.]
THOMAS HERBERT. [SEAL.]

Signed, sealed and delivered in presence of—
M. B. FRYER.

PENNSYLVANIA, } ss:
Fayette County, }

Before me, a justice of the peace, in and for said county and State, came the above-named George W. and Thomas Herbert and
406 acknowledged in due form of law, the above indenture to be their act and deed, and desired it to be recorded as such.

Witness my hand and seal this Dec. 3d, 1885.

M. B. FRYER, *J. P.* [SEAL.]

Recorded and compared December 5th, 1885.

CHAS. D. CONNER, *Recorder.*

PENNSYLVANIA, } ss:
Fayette County, }

I, David R. Anderson, register of wills, recorder of deeds, &c., in and for said county, do hereby certify that the foregoing instrument is a true and correct copy of a deed as appears of record in my office.

Witness my hand and seal this 12th day of December, A. D. 1891.

[SEAL.] DAVID R. ANDERSON, *Recorder.*

Agreement as to House in Controversy.

It is hereby agreed by counsel that the inside of the dwelling-house in controversy in this case is constructed and finished substantially in the manner assumed and described by A. J. Fairchild in his deposition.

Aug. 31st, 1892.

GEORGE SHIRAS, 3D,
C. C. DICKEY,
Counsel for Def't.
EDWARD CAMPBELL,
Att'y for Pl'ffs.

Filed Aug. 31, 1892.

407 *Opinion of the Court.*

ACHESON, *Cir. J.:*

The Youghiogheny River Oil Company, being the owner of a tract of land containing thirty-four acres, in or shortly before the year 1872, laid out the land into lots and streets, and called the place the town of Sedgwick. The streets were marked on the ground by stakes, and a draft or plan of the town was made by the company and exhibited by its agent. This plan, it would seem, has been lost or mislaid.

By deed dated March 5th, 1872, and duly recorded on October 29th, of the same year, the Youghiogheny River Oil Company, conveyed to Elizabeth Dean, one of the town lots, described in the deed as "All that lot or piece of ground situate in the new town of Sedgwick, Tyrone township, Fayette county, State of Pennsylvania, numbered in the plot of said town No. one (1), containing on Front street, fifty-four feet, six inches, and running back along Sedgwick street, two hundred feet, to Second street," and by deed dated September 16th, 1873, and duly recorded, said company, conveyed to said Elizabeth, another of the town lots, described in the deed as lot numbered two (2) in the plan of the town of Sedgwick, containing on Front street, fifty-four feet, six inches, and running back between lots numbered one and three, two hundred feet, to Second street.

Shortly after her purchase of the lots of ground Elizabeth Dean erected thereon a frame dwelling-house located at the corner of Front and Sedgwick streets, the house fronting on Front street and running

back along Sedgwick street. By deed dated September 16th, 1873, and duly recorded, the said company conveyed to Margaret Herbert, lots numbered 7 and 8, in said town plan, each containing fifty-four feet, six inches, on Front street, and running back two hundred feet to Second street.

408 By deed dated December 11th, 1879, the Youghiogheny River Oil Company conveyed to the defendant, W. J. Rainey, all the residue of the said land. This deed in its premises recites: "And whereas the said The Youghiogheny River Oil Company did convey at sundry times part of the same premises, to wit, a small piece or parcel of land containing fifty-four feet, six inches, front (fronting toward the Pittsburgh and Connellsville railroad), and extending back the same width a distance of two hundred feet, to Elizabeth Dean, deed dated March 5th, A. D. 1872. Also a small piece or parcel of land adjoining the above-described piece of land, containing fifty-four feet, six inches, frontage extending back the same width a distance of two hundred feet, to Elizabeth Dean, by deed dated September 16th, 1873." Then ensues a similar recital of the conveyance to Margaret Herbert, with a like reference to the deed to her. The deed to the defendant then proceeds to convey to him the tract of land by a general description, but with the following exception clause: "Exempting, however, therefrom the several pieces or lots of land hereinbefore mentioned as having been granted and conveyed by the said The Youghiogheny River Oil Company unto Elizabeth Dean and Mrs. Margaret Herbert."

About the year 1885 George W. Herbert and Thomas Herbert, two of the plaintiffs, purchased the said two lots numbered one and two in the plan of the town of Sedgwick, and on November 30th, 1885, by deed of that date from one Cochran and under certain prior conveyances they acquired the title and succeeded to the rights of Elizabeth Dean under the above-recited deeds from the Youghiogheny River Oil Company to her. George and Thomas then granted to their parents, Henry and Margaret Herbert, (the other two plaintiffs) an estate for their lives and the life of the survivor of them in and to said two lots, and the latter are in possession thereof, living in the dwelling-house already mentioned.

409 Shortly before the bringing of this suit the defendant located, and he was then proceeding to erect a number of coke ovens upon and along Front street, immediately in front of the plaintiffs' said lots and their dwelling-house thereon for the purpose of continuously burning coal therein and manufacturing coke. The bill charges that the erection and operation of these coke ovens as proposed by the defendant would be a permanent and continual trespass upon the plaintiffs' lots and injury to their dwelling-house, a permanent obstruction to their ingress and egress into and out of their said premises and a nuisance thereto by producing smoke, flame and heat continuously so near to said premises as to render the same uninhabitable, and the bill prays for an injunction.

A preliminary injunction was granted by Judge Reed, and the case is now before the court upon plenary proofs for final disposition.

The truth of the above-recited allegations of the bill is indisputably established by the evidence. Not only is the location of the proposed coke ovens within the lines of Front street as laid out in the plan of the town of Sedgwick, but the ovens would not be over two feet from the plaintiffs' house. If erected they would cut off the plaintiffs from access to and egress from their house by way of Front street, while the operation of the ovens would not only expose the house to constant danger from the flames, but the smoke, gases and heat therefrom would make the house totally unfit for occupancy, would also kill the fruit trees on the premises and render the whole property nearly if not altogether valueless.

The legal principles applicable to the facts of the case are plain and need little discussion.

A conveyance of a lot of ground bounded by a public street
410 gives to the grantee title in the soil to the middle of the street if the grantor had title. Paul *vs.* Carver, 26 Pa. St., 223; Transue *vs.* Sell, 105 Pa. St., 604; but even where the fee in the street, called for as a boundary, is not thus conveyed, a right of way over it passes with the lot as an appurtenance necessary to its enjoyment. Ott *vs.* Kreiter, 110 Pa. St., 370.

Where upon the sale of a lot the deed refers to a plan, it becomes a material and essential part of the conveyance and is to have the same effect as though copied into the deed. Birmingham *vs.* Anderson, 48 Pa. St., 253; and a call in the deed for streets in the plan amounts to a dedication of them to the use of the purchaser as public ways. Ferguson's Appeal, 117 Pa. St., 426; and this is so, even if the streets are not yet opened. *Ibid.* For when the proprietor of a body of land sells and conveys the same in lots according to a plan which shows the lots to be on streets, he must be held to have impressed upon them the irrevocable character of public streets; and not only can the purchasers of the abutting lots assert this character, but so can all other lot-owners in the general plan. *In re* Opening of Pearl Street, 111 Pa. St., 565.

The reference in the Youghiogheny River Oil Company's deed to the defendant to the earlier deeds from that company to Elizabeth Dean, was positive notice to the defendant of those prior deeds, and full knowledge of the provisions thereof is imputable to him when he took title. Bellas *vs.* Lloyd, 2 Watts, 401; Steckel *vs.* Desh, 12 W. N. C., 130; Birmingham *vs.* Anderson, *supra;* McKee *vs.* Perchment, 69 Pa. St., 342, 350. The defendant thus stands affected with notice of his grantor's plan of the town of Sedgwick, of the existence of Front street, as laid down thereon, and the relation of lots numbered one and two, in the plan to that street. The defendant, therefore, can no more question the plaintiffs' right to the free and
411 unobstructed use of Front street, or interfere with their exercise of that right, than could the Youghiogheny River Oil Company itself.

Now a court of equity will protect a party entitled to a right of way in its enjoyment, by restraining the erection of permanent obstruc*tuc*tions on the roadway or street. Appeal of Hacke & Hughus, 101 Pa. St., 245; Ferguson's Appeal, *supra;* Shipley *vs.* Caples, 17

Md., 179; and we think the plaintiffs' legal right is sufficiently clear to bring them within the principle of these authorities. It is true that, in the absence of the town plan, there may be some question as to the exact width of Front street, although the evidence now before us would justify the conclusion that it is sixty feet wide. But the line of the street, on the side next the plaintiffs' house, is clearly fixed, and whatever may be its true width, undoubtedly, the site selected by the defendant for his coke ovens is part of the street, and if built as located, their proximity to the plaintiffs' house will cut it off from the street.

But independently of this encroachment on Front street, the proofs show that the plaintiffs are menaced with a permanent and most hurtful nuisance, against which they are entitled to equitable relief. Any business, however lawful in itself, which, as to a dwelling-house, near which it is carried on, causes annoyances which materially interfere with the ordinary physical comfort of human existence is a nuisance which should be restrained. Roderhausen *vs.* Craven, 141 Pa. St., 546; Ross *vs.* Butler, 19 N. J. Eq., 294; Cleveland *vs.* The Citizens' Gas Light Co., 20 N. J. Eq., 201; Pennsylvania Lead Company's Appeal, 96 Pa. St., 116. Not only are such evils incident to the threatened coking operations, but the contemplated business will be dangerous and destructive to the plaintiffs' property, and the injury of a continuing character, for which the common-law forms of action furnish no adequate remedy. The plaintiffs' rights are clear, and, therefore, a previous trial at law is not a prerequisite to equitable interference. *Ibid.*: Wood on Nuisances, 777.

412 The jurisdiction of the court, however is challenged upon the ground that the sum or value of the matter in dispute is below our jurisdictional limit. But no such cause of objection appears upon the face of the bill, for it is alleged therein that if the defendant should erect his coke ovens on Front street, and operate the same as contemplated by him, the damage to the plaintiffs' house and lots would be more than $2,500. Now, in actions *ex delicto*, where the law does not fix the amount recoverable, the plaintiffs' claim is the criterion of jurisdiction, unless it appears to the satisfaction of the court that the amount of damages stated is colorable and has been laid beyond the amount of a reasonable expectation of recovery. Wilson *vs.* Daniel, 3 Dall., 401; Barry *vs.* Edmunds, 116 U. S., 550, 561; Gorman *vs.* Havind, 141 U. S., 206. But the evidence before us is convincing that the above-cited allegation of the bill was made in perfect good faith. There is abundant evidence tending to sustain the truth of the averment. The proofs entirely satisfy us that there was here no purpose to create or state a case colorably within our jurisdiction. The plaintiffs' *ante litem* valuation of their property was $2,500, and we think this estimate was honestly made. A number of witnesses fix that sum as a fair valuation. Most certainly, the plaintiffs' claim is not so extravagant as to be inconsistent with good faith, or beyond a reasonable expectation of its allowance by a judicial tribunal. True, the witnesses on the one side greatly differ from the witnesses on the other

side in their estimates, as is not uncommon where the value of real estate is concerned. But, upon the whole evidence, a jury or a master might well find the plaintiffs' property to be worth over $2,000. We are then of the opinion that this suit does "really and substantially involve a dispute or controversy properly within the jurisdiction" of the court, even if we confine our attention exclusively to the question of the value of the plaintiffs' property, which the bill seeks to preserve from a destructive nuisance.

But the defendant, in an affidavit on file in the cause, has stated that the continuance of the injunction would damage him
413 "many thousands of dollars." Now, in Mississippi, etc., Railroad Company *vs.* Ward, 2 Black, 485, 492, a suit in equity to abate a nuisance, it was ruled that the want of a sufficient amount of damages suffered by the plaintiff to give the court jurisdiction would not defeat the suit if the value of the object to be attained, namely, the removal of the nuisance, was up to the jurisdictional sum. And in Market Company *vs.* Hoffman, 101 U. S., 112, the value of the right, the exercise of which was enjoined, was held to be a test of jurisdiction. Whether, then, regard be had to the plaintiffs' property, the preservation of which is here involved, or to the defendant's use of his projected coking plant sought to be restrained, in either view, the matter in dispute exceeds the sum or value of $2,000 exclusive of interest and costs.

We have only to add that the defendant's further objection to our cognizance of this case, based upon a supposed aggregation of distinct interests existing in the life tenants and remaindermen, in order to give the jurisdictional amount is unfounded. The plaintiffs are not here suing for damages to their respective estates, but they seek a preventive remedy against the injury and destruction of property in which they have a common interest. Perhaps, either the life tenants or the remaindermen acting alone might have maintained this bill for the preservation of the corpus of the estate, but their joinder as co-owners was proper. Adams Eq., *315. As the plaintiffs have a common interest and seek a common object, their case falls within the principle, that, if several persons have a common and undivided interest, though separable as between themselves, the amount of their joint interest will be the test of jurisdiction. Shields *vs.* Thomas, 17 How., 3; Rodd *vs.* Heartt, 17 Wall., 354; Clay *vs.* Field, 138 U. S., 464; New Orleans Pacific R'y Co. *vs.* Parker, 143 U. S., 42.

A decree will be entered in favor of the plaintiffs.

Filed Dec. 14, 1892.

414 *Decree.*

And now, December 30th, 1892, this cause came on to be heard, at this term, on bill, answer and plenary proofs, and, after argument by counsel and due consideration by the court, it is ordered, adjudged and decreed, that a permanent injunction issue, restraining respondent, William J. Rainey, his servants, agents and employés.

First. From locating and erecting any coke ovens in or upon

Front street in the plot or plan of the village of Sedgwick, in Fayette county, Pennsylvania.

Second. From operating any coke ovens so near the premises of the said complainants as to injure the same by reason of flames, heat, gases or smoke emitted therefrom.

It is also ordered, adjudged and decreed, that the said William J. Rainey do immediately cease to operate and within thirty days remove from the said Front street in the said village of Sedgwick all coke ovens, buildings, structures, building materials or obstructions to travel, of any kind whatever, erected, located or placed on the said Front street by the said William J. Rainey, his servants, employés, or agents, or by or with the authority, knowledge or consent of the said William J. Rainey, and that he do forthwith restore the said street to the condition of the same at the time that the said William J. Rainey entered thereupon for the purpose of constructing coke ovens in or upon the same, and it *it* is further adjudged that nothing in this case shall prejudice any right or remedy in law or equity or otherwise which the complainants or any of them may have for any injury or damage done by the respondent since the filing of the bill in this case.

It is further ordered that the respondent, William J. Rainey, pay the costs of this case.

BY THE COURT.

Filed Dec. 30, 1892.

415 *Injunction.*

THE UNITED STATES OF AMERICA, } *sct:*
Western District of Pennsylvania, }

The President of the United States to W. J. Rainey, his agents, servants, employees, workmen, and all others acting by and under his authority, and each of them, Greeting:

Whereas, George W. Herbert, Thomas H. Herbert, Henry Herbert and Margaret Herbert lately exhibited their bill of complaint against the said W. J. Rainey as defendant in the circuit court of the United States in and for the western district of Pennsylvania, before the judges of the said court, in which said bill it is alleged *inter alia*, that said complainants were and are damaged by the unlawful acts of the said defendant, in erecting and operating a line of coke ovens in and upon Front street, and adjacent to the dwelling-house of complainants in the plot or plan of the village of Sedgwick, in Fayette county, Pennsylvania, and that said cause has been so proceeded in, that upon the said bill, answer and proofs, and after argument by counsel, and due consideration by the court, it was ordered, adjudged and decreed that a permanent injunction issue against the said defendant, his agents, servants and employees as in said order and decree directed.

Now therefor-, in consideration of the premises, you, the said W. J. Rainey, your agents, servants, employees and workmen, and all others acting by and under your authority, and each and every of

you, are strictly commanded and enjoined, under such penalties as are inflicted by the law of the United States, that you and each of you do absolutely desist and abstain.

416 First. From locating and erecting any coke ovens in or upon Front street in the plot or plan of the village of Sedgwick, in Fayette county, Pennsylvania.

Second. From operating any coke ovens so near the premises of the said complainants as to injure the same, by reason of flames, heat gases or smoke emitted therefrom.

It is also ordered, adjudged and decreed that the said William J. Rainey do immediately cease to operate, and within thirty days remove from the said Front street, in the said village of Sedgwick, all coke ovens, buildings, structures, building materials or obstructions to travel, of any kind whatsoever, erected, located or placed on the said Front street, by the said William J. Rainey, his servants, employees or agents, or by or with the authority, knowledge or consent of the said William J. Rainey, and that he do forthwith restore the said street to the condition of the same at the time that the said William J. Rainey entered thereupon for the purpose of constructing coke ovens in or upon the same.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the court-house, in the city of Pittsburgh, in said district, this 31st day of December, A. D. 1892.

[SEAL.] H. D. GAMBLE, *Clerk.*

417 *Service.*

Served the within writ January 4, 1893, personally on George Shiras, 3d, Esq., attorney of the defendant Wm. J. Rainey, at the office of said attorney, in the city of Pittsburgh, also on the same day, personally on Alex. J. Hill, said to be ass't superintendent for the said defendant, at Vanderbilt, Fayette county, Pennsylvania, also on the same day and at the place last aforesaid, personally on Thomas J. Mitchell, general manager for said defendant, by making known to them, the said Shiras, Hill, and Mitchell, the contents of said writ, and giving to each of them a true and attested copy thereof. Also on January 3d, 1893, sent a like copy by registered letter in the United States mail to the said Wm. J. Rainey at the city of Cleveland, in the State of Ohio. See returned registered-letter receipt hereto attached.

So ans.

J. R. HARRAH,
U. S. Marshal.

Services	$10 00
Actual exp	5 85

Registry return receipt sent Jan. 3, 1893, from post office at Pittsburgh, Pa., addressed to Wm. J. Rainey, post office at Cleveland, Ohio.

Received the above-described registered letter.

W. J. RAINEY,
By W. T. RAINEY.

418 *Petition for Appeal and Allowance Thereof.*

To the honorable the judges of said court:

The petition of Wm. J. Rainey, the above-named defendant, respectfully represented:

That your petition- is a party aggrieved by the final decree entered by your honorable court in the above-entitled cause, and that he desired to appeal from said final decree to the circuit court of appeal, for the third circuit.

Your petitioner herewith offers good and sufficient security for the payment of all damages and costs in this cause, and prays your honors to allow your petitioner such appeal and to award a proper writ of error and citation to the plaintiffs. And your petitioner will ever pray, etc.

WILLIAM J. RAINEY.

STATE OF OHIO, } ss:
Northern District, }

Personally, before me, the undersigned authority, came the above-named William J. Rainey, who, being duly sworn, deposes and says that the foregoing petition is true, and that the appeal taken by him to the circuit court of appeals is not intended for delay.

WILLIAM J. RAINEY.

Sworn to and subscribed before me this 16th day of January, 1893.

R. K. BEACH,
Dept. Clerk U. S. Circuit Court, Northern District of Ohio.

419 *Bond on Appeal.*

Know all men by these presents, that we, William J. Rainey, of the city of Cleveland, in the State of Ohio, and Alexander J. Hill, of the county of Fayette, in the State of Pennsylvania, are held and firmly bound unto George W. Herbert, Thomas Herbert, Henry Herbert and Margaret Herbert, all of the county of Fayette, aforesaid in the sum of six thousand dollars, to be paid to the said George W. Herbert, Thomas Herbert, Henry Herbert and Margaret Herbert, their certain attorney, their executors, administrators, or assigns:

To which payment well and truly to be made we, and each of us, do bind ourselves, our heirs, executors and administrators firmly by these presents.

Sealed with our seals, dated the sixteenth day of January, A. D. one thousand eight hundred and ninety-three.

The condition of the above obligation is such that if the said William J. Rainey, appellant from the decree of the circuit court of the United States, for the western district of Pennsylvania, in a certain bill in equity at No. 30, November term, 1891, of said court, wherein the said obligees are plaintiffs and the said William J. Rainey, is defendant to the circuit court of appeals for the third

circuit, shall prosecute his appeal to effect, and if he fail to make his plea good, shall answer all damages and costs that shall be adjudged against him, then this obligation shall be void, otherwise to be and remain in full force and virtue.

WILLIAM J. RAINEY. [SEAL.]
ALEX. J. HILL. [SEAL.]

Sealed and delivered in the presence of us.
HENRY J. G. MELCHER,
For signature of W. J. Rainey.
CHARLES C. DICKEY,
As to Alex. J. Hill.

420 And now, to wit, January 17th, 1893, the within petition and bond presented to the court, and upon motion of counsel for appellant said bond is approved and the appeal is allowed.

BY THE COURT.

Filed January 17, 1893.

421 *Assignments of Error.*

1st. The court below erred in deciding that the amount in controversy in this case was such as to give the court jurisdiction thereof, and in sustaining its own jurisdiction.

2nd. The court erred in finding and decreeing that there was laid out a town or place called Sedgwick, and that there was laid out in said town a street called Front street.

3rd. The court below erred in not finding and decreeing that if such town and the said Front street, ever were laid out the same were abandoned prior to the date at which the plaintiffs acquired their title.

4th. The court erred in holding and deciding that the recitals and deed of December 11, 1879, from the Youghiogheny River Oil Company to said W. J. Rainey, were notice to him of the alleged dedication of Front street, and the laying out of said town.

5th. The court below erred in not holding and deciding that the location and width of said Front street, were too indefinite and uncertain to be made the foundation of a decree in favor of the plaintiffs.

6th. The court erred in that part of its final decree which directed that the said W. J. Rainey, cease to operate and within thirty days remove from said Front street, all coke ovens, buildings and structures located or placed on Front street, by said W. J. Rainey, or by his authority.

7th. The court erred in not restricting its final decree to the prayer of the bill, to wit: A preliminary injunction hereafter to be made permanent restraining the respondent from locating, erecting and operating the said coke ovens upon said street in front of or near the said premises of the plaintiffs.

422 8th. The court erred in allowing the amendment of the bill of complaint of June 7, 1892, whereby Henry Herbert and Margaret Herbert, were made parties plaintiff.

9th. The court erred in making the final decree of December 31, 1892.

10th. The court erred in not deciding that the plaintiffs' bill was an ejectment bill and in not dismissing it for that reason.

11th. The court erred in that part of said decree which reserved to the plaintiffs a right to proceed against the defendant at law.

12th. The court erred in that part of said decree which imposed the costs of these proceedings upon the defendant.

13th. The court erred in not dismissing the plaintiffs' bill.

And now, to wit, January 17, 1893, the appellant, William J. Rainey, humbly prays that the final decree of the said circuit court of the United States, for the western district of Pennsylvania may be reversed.

SHIRAS & DICKEY,
Counsel for Appellant.

Filed January 17, 1893.

423 *Citation.*

UNITED STATES OF AMERICA, *Western District of Pennsylvania,* } *sct:*

To George W. Herbert, Thomas H. Herbert, Henry Herbert and Margaret Herbert, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the third circuit, to be holden at Philadelphia, Pennsylvania, on the 16th day of February next, pursuant to an appeal filed in the clerk's office of the United States circuit court, wherein William J. Rainey is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 17th day of January, A. D. 1893.

M. W. ACHESON,
Judge U. S. Circuit Court.

Attest: H. D. GAMBLE, *Clerk.*

And now, to wit, January 17, 1893, service of the above citation is hereby acknowledged.

J. M. GARRISON,
Of Counsel for Appellees.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

424 I, H. D. Gamble, clerk of the circuit court of the United States, for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above-entitled case, so full and entire as the same remains of record and on file in my office.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said court, at Pittsburg, this 14th day of February A. D. 1893.

[SEAL.] H. D. GAMBLE, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, M. W. Acheson judge of the United States circuit court for said district, do hereby certify that H. D. Gamble above named was, at the time of making the above certificate, and is now, clerk of the said court, and that the said certificate made by him is in due form of law.

M. W. ACHESON,
U. S. Circuit Judge.

Pittsburgh, February 14, 1893.

And afterwards, to wit, on the thirtieth day of March, A. D. 1893, come the parties aforesaid, by their solicitors aforesaid, and this cause being called for argument on the transcript of record, and having been argued by counsel for the respective parties, and the court not being fully advised in the premises takes further time to consider thereof.

425 And afterwards, to wit, on the twenty-fifth day of April, A. D. 1893, come the parties aforesaid, by their solicitors aforesaid, and the court, being fully advised in the premises, file the following opinion, to wit:

United States Circuit Court of Appeals, Third Circuit.

Appeal from the circuit court of the United States for the western district of Pennsylvania.

WILLIAM J. RAINEY
vs.
GEORGE W. HERBERT *et al.*

Before Dallas, Butler, and Wales, JJ.

Opinion of the Court.

DALLAS, *J.:*

This is an appeal from a decree for an injunction restraining the erection of certain coke ovens. The jurisdiction of the circuit court was dependent upon the amount involved in the controversy. There was some conflict of testimony as to the amount of the damage which would result to the complainants from the construction and operation of the ovens, but the court below found that the averment that it would exceed $2,000 was supported by abundant evidence, and if the matter in dispute were simply and solely the threatened injury to the plaintiffs this finding of fact might be accepted as in itself conclusive. But if this were otherwise, the want of a sufficient amount of damage having been alleged and proved

to give the Federal courts jurisdiction would not defeat the remedy, as the prohibition of the contemplated erection of the ovens was the matter of controversy, and the value of that object (admittedly in excess of the jurisdictional amount) must govern. R. R. Co. *vs.* Ward, 2 Black, 485 (492). Consequently the first assignment of error has not been maintained.

426 The opinion of the court below presents the law and the facts relating to the erection and operation of coke ovens "in or upon Front street, in the village of Sedgwick," in a manner entirely satisfactory. It is therefore adopted by this court as correctly disposing of the several questions which are raised by the assignment of errors from the second to the sixth, inclusive. The decree, however, goes further and is, we think, too comprehensive. It not only restrains the placing of ovens upon Front street, but also forbids their operation on the defendant's own property "so near the premises of the said complainants as to injure the same by reason of flames, heat, gases, or smoke emitted therefrom." The only prayer for special relief was for "a preliminary injunction, hereafter to be made perpetual, restraining the respondent from locating, erecting, and operating said coke ovens or any of them upon the said street in front of or near the said premises belonging to your orators as aforesaid." The particular relief which was awarded by that portion of the decree now under consideration was not prayed in the bill, nor did it even suggest that such relief would be asked upon the hearing. There was, it is true, a prayer for general relief, but it is a familiar rule of equity pleading that under such a prayer the court will afford a complainant such relief only as is agreeable to the case made by his bill, and the case made by the bill upon this record is wholly confined to the distinct subject of the proposed erection and operation of coke ovens upon Front street. The bill will not bear any other construction. Its language is perfectly clear. The gravamen of the complaint is that coke ovens "upon the said Front street
427 of the said town of Sedgwick will be a permanent and continual trespass * * * and a permanent obstruction;" and although it is added that a nuisance from smoke, &c., will result, this, too, is averred with respect to ovens upon the street. From beginning to end not a word is said about nuisance to arise from the operation of ovens elsewhere; the special prayer does not relate to any such nuisance, and, as we have said, the general prayer cannot be applied to it. This branch of the case was disposed of by the learned judge below in a single paragraph of the opinion which he filed, from which it does not appear that his attention had been directed to the restricted character of the bill; but we, with that fact in view, are constrained to hold that, in so far as ovens not upon the street were included in the terms of the decree, it was improvidently made. English *vs.* Foxall, 2 Pet., 595 (611); Halson *vs.* M'Arthur, 16 Pet., 182 (195); Savory *vs.* Dyer, Ambler, 70; Wright *vs.* Atkyns, 1 Ves. & B., 313.

If, however, a nuisance, independently of the encroachment upon Front street, had been duly alleged, it would not necessarily follow

that the complainants would have been entitled to an injunction based upon that allegation. We will not enter upon an extended discussion of this aspect of the matter, because it is not necessary that we should do so; but we deem it proper to suggest, with reference to any possibly contemplated further proceedings, that whilst is is generally true that annoyances which substantially detract from the ordinary comfort of life may be enjoined, yet equity will never interpose where a due regard for all the attendant circumstances should impel a chancellor to withhold his hand. In Robb *vs.* Carnegie (145 Pa. St., 324) it is said that the operation of coke ovens at an appropriate place will not be enjoined, and in 428 Huckenstine's appeal (70 Pa. St., 102) an injunction against brick-burning was, in view of the surrounding circumstances, refused. There are numerous other judicial decisions of the same import, but in these two cases the principle to which we desire to direct attention is sufficiently exemplified. The seventh assignment of error is sustained.

The eighth and twelfth assignments of errors are to the allowance of an amendment by which Henry Herbert and Margaret Herbert were made parties plaintiff and to the imposition of the costs upon the defendant below. They are not supported. No wrong was done the defendant by admitting the life tenants as joint complainants with the remaindermen or by the manner of their admission, and the costs of the proceeding were not increased because this was done or by reason of the time at which it was done. No further amendment of the bill became requisite or was made in consequence of the addition of these parties, and the evidence which had been previously taken was as pertinent after their addition as it was before.

The remaining assignments do not require separate consideration. They are not sustained.

The decree of the circuit court is now modified by striking therefrom the second paragraph thereof, viz: "Second. From operating any coke ovens so near the premises of the said complainants as to injure the same by flames, heat, gases, or smoke emitted therefrom;" and as thus modified the decree is affirmed.

And it is further ordered that one-half of the costs of this appeal shall be paid by the appellant and one-half thereof by the appellees.

(Endorsed:) United States circuit court of appeals, third circuit. No. 14. March term, 1893. Wm. J. Rainey, appellant, *vs.* George W. Herbert *et al.* Opinion of the court by Dallas, J. Filed April 25, '93.

429 United States Circuit Court of Appeals, Third Circuit.

WILLIAM J. RAINEY, Appellant,
vs.
GEORGE W. HERBERT, THOMAS H. HERBERT, HENRY HERBERT, and MARGARET HERBERT.

Appeal from the circuit court of the United States for the western district of Pennsylvania.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the western district of Pennsylvania, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, modified by striking therefrom the second paragraph thereof, viz: "Second. From operating any coke ovens so near the premises of the said complainants as to injure the same by flames, heat, gases, or smoke emitted therefrom;" and as thus modified the decree is affirmed.

And it is further ordered that one-half of the costs of this appeal shall be paid by the appellant and one-half thereof by the appellees.

Philadelphia, April 28, 1893.

GEO. M. DALLAS, *C. J.*

(Endorsed:) United States circuit court of appeals, third circuit. No. 14. March term, 1893. Wm. J. Rainey, appellant *vs.* George W. Herbert *et al.* Decree modified and each party pay half the costs of this appeal. Entered & filed April 28, 1893.

430 UNITED STATES OF AMERICA, *sct:*

I, William V. Williamson, clerk of the United States circuit court of appeals for the third circuit, do hereby certify the foregoing to be a true and faithful copy of the transcript of record and proceedings in the case of William J. Rainey, appellant, *v.* George W. Herbert, Thomas H. Herbert, Henry Herbert, and Margaret Herbert, appellees, No. 14, March term, 1893, on file and now remaining among the records of the said court in my office.

Seal United States Circuit Court of Appeals, Third Circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this twenty-eighth day of June, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

WM. V. WILLIAMSON,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: Case No. 15,360. No. 976, October term. 1893. United States Supreme Court. Wm. J. Rainey, app't, *vs*, Geo. W. Herbert *et al.* Certified copy of record. Filed July 28, 1893.

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